

**Essays on  
Human Rights and  
Democratic Development**

People or Peoples;  
Equality, Autonomy and  
Self-Determination:  
The Issues at Stake of the  
International Decade of the  
World's Indigenous People



INTERNATIONAL CENTRE FOR HUMAN  
RIGHTS AND DEMOCRATIC DEVELOPMENT

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Essays on Human Rights and  
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Paper no. 5

International Centre for Human Rights and  
Democratic Development

Montréal, 1996

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The opinions expressed in this essay are the author's own and do not necessarily reflect the views of the International Centre for Human Rights and Democratic Development.

**Legal deposit :**

Bibliothèque nationale du Québec, second quarter, 1996.

National Library of Canada, second quarter, 1996.

ISBN : 2-922084-00-0

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International Centre for Human Rights  
and Democratic Development  
63, rue de Brésoles, Montréal (Québec)  
Canada H2Y 1V7.

Editor : Société Recherches amérindiennes au Québec, Montréal.

Printed in Canada

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## Presentation

With the adoption by the United Nations, of the International Decade of the World's Indigenous People, it is now clear that the particular situation, the rights and claims of these peoples and of those individuals who constitute them, must be better known and that their participation in international, regional and national proceedings is absolutely essential. Last December, the General Assembly invited the international community to contribute to the success of this decade whose fundamental objective is to reinforce international cooperation in order to solve the problems facing indigenous peoples with regards to human rights, the environment, development, education and health. At the International Centre for Human Rights and Democratic Development, we have decided to endorse this objective notably by encouraging research, dialogue and an exchange of information regarding the promotion of the rights of indigenous peoples.

This publication thus represents a first contribution from the Centre in this regard. The essays prepared by Ms. Maivân Clech Lãm and Mr. Denis Marantz deal with two different but complementary subjects. Based on his experience as a former high official of the Government of Canada responsible for issues relating to indigenous peoples on the international scene, Mr. Marantz presents us with a detailed analysis of the debates on indigenous peoples taking place in international and regional proceedings. His approach, which can be defined as diplomatic, attaches great importance to the fact that within the United Nations Organization and the Organization of American States, it is the States that set the rules of the game and that keep control over the solutions put forward regarding the stakes characteristic of

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# Issues Affecting the Rights of Indigenous Peoples in International Fora

*B. Denis Marantz*

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**T**his paper posits that the onus of achieving an international recognition of indigenous rights lies on indigenous peoples as well as governments and that the Aboriginal peoples of Canada and the Government of Canada can lead the way. They both know how but can or will they do it?

A right of self-determination at international law is the central issue for indigenous peoples who seek recognition of their collective and individual rights in international fora and in the countries in which they live. Recognition of this right opens all doors to the management of their own affairs. The debate now underway at the level of governments in the United Nations (UN), and about to be launched in the Organization of American States (OAS), must not be

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The author, a former official of the Government of Canada, is a consultant on indigenous and foreign affairs. Eighteen of his public service years were given to third world development while nine more were spent in the Privy Council and Federal Provincial Relations Offices as a senior advisor (constitutional, policy and programmes) on aboriginal and northern matters. He served his last five years as Departmental Coordinator of International Aboriginal Affairs for the Department of Foreign Affairs and International Trade where he represented the Government in Canada and abroad on international aboriginal issues.

rights of the individual but which are not necessarily consonant with the ethos relating to collective rights. Harmonizing the best features of individual and collective rights without invading the interests of non-indigenous peoples or giving short shrift to indigenous peoples is the challenge which multilateral institutions, states and indigenous peoples must face.

At the UN, a declaration on the rights of indigenous peoples has been drafted by five experts of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights (CHR) and brought forward for the consideration of governments<sup>1</sup>. Indigenous leaders have clearly stated that no changes be made to the draft declaration. Their dilemma lies in determining whether the absoluteness of rights embodied in a theoretical approach should be their immutable objective. Compromise encompasses inevitably a dilution of rights, as has occurred in the overall evolution of other standards of rights, as they have been applied to all peoples, including indigenous peoples.

It is up to the Aboriginal peoples of Canada to seek not only the support of the Government of Canada for the positions that they would take to Geneva but also to urge on the Government that it take the lead in persuading other governments to follow suit. Deep differences persist between both parties in Canada over certain issues but sight should not be lost of the fact that Canada supports or has only minor problems with the vast majority of provisions in the draft declaration. Further compromise is possible. It is time for representatives of the Aboriginal peoples of Canada to put behind them all of the differences that have characterized the drafting stage of the declaration. The Government in turn has a responsibility to apply the same energy and goodwill to the outcome of the



document that it has given to the development of other instruments in the UN.

The observations of this paper apply also to the process for considering the draft of the Inter-American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights<sup>2</sup>. They stem from the experience gained in the UN process for developing the draft declaration on the rights of indigenous peoples and are relevant because so much in the OAS document is inspired by past processes in the International Labour Organisation (ILO), in the Working Group on Indigenous Populations (WGIP) and other UN seminars.

Ultimately, the process relates more to politics than to law and must be addressed as such if the indigenous goal of a legal instrument is to be reached.

### **The Current Situation**

Issues of specific and general interest to indigenous peoples are permanent features of the international agenda. Until recently, the accent has been on "rights" issues but increasingly, indigenous peoples are seeking their inclusion in national and multilateral decision making. As well, they are getting their issues on the national agendas of countries, many of which have refused until recently to consider that indigenous peoples could or should occupy unique places in their respective societies. Even if some of these countries were motivated only by their wariness of the international attention they can draw to themselves for unbridled exploitation of indigenous peoples and their lands, they are at least tentatively exploring new relationships.

## **Background**

In 1981, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights (CHR) proposed the establishment of a working group on indigenous populations (the WGIP) to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations and to give special attention to the evolution of standards concerning their rights. The proposal was endorsed by the CHR<sup>3</sup> and authorized by the UN Economic and Social Council (ECOSOC)<sup>4</sup> in 1982. The agenda has expanded since then from the immediate purposes of the WGIP mandate to encompass notably but not exclusively, discussions on reports on treaties and cultural properties, the International Decade of the World's Indigenous People, the future role of the WGIP and consideration regarding the possible establishment of a permanent forum for indigenous peoples in the UN.

The WGIP met for the first time in Geneva in 1982 and every meeting since then has been in that city. Over time, the WGIP has added to its mandate an annual consideration of other issues relating to the situations of indigenous peoples in their respective countries. This stems from the inevitable expression of legitimate grievances in illustration of why certain protections of rights are required in addition to those which International Covenants on economic, social and cultural rights, as well as civil and political rights and other instruments provide.

The WGIP is composed of five experts, each representing one major geopolitical region of the world (Africa, Asia, Central and South America, Eastern Europe and the West). They are selected from among the 28 representatives of the Sub-Commission on

Prevention of Discrimination and Protection of Minorities, elected to that body by the CHR on the basis of their non-partisan expertise in the field of human rights.

The elaboration of rights instruments is a laborious process. For instance, both International Covenants were adopted by the UN General Assembly in 1966, after lengthy discussion and consideration. Even then, they only came into force in 1976. In the relatively short time frame of twelve years, the WGIP has come to draft a declaration on the rights of indigenous peoples that encompasses nearly all indigenous aspirations. The process for reflecting on the draft declaration has grown from the participation of a few dozen individuals to more than 700 persons, institutions and non-government organizations in 1995. As all of these persons have a right of intervention, it is worth noting, as do many others, that the WGIP process is unique with respect to the proceedings of the United Nations. A half a dozen governments sent observers to the first meeting whereas some thirty-seven attended all relevant meetings of the 13th session in 1995. Despite their formal positions as observers, governments and indigenous representatives play active roles in the discussions through their observations on process and substance.

### **The Multilateral Environment**

It is critically important to understand the environment in which indigenous issues are debated by states. It is particularly important to be sensitive to the perspectives of these same states if one wishes to arrive at a multilateral and universal institution-alization of the collective rights of indigenous peoples.

In the UN, the universal application of standards and the acceptance of these by consensus, are fundamental principles for progressing on a corpus of human rights. Because of conflicting value systems and political/economic interests, often the lowest common denominator emerges from the exhaustive process of debate. No rights instruments would have come into existence if all participants to their elaboration had held fast to their highest aspirations.

The impression is often created by indigenous representatives and some observers that multilateral organizations (the UN in particular) are supranational bodies in their own right, empowered to supersede the national authority of the state. Some who press for the eventual acceptance of a declaration on the rights of indigenous peoples would like to see in the UN, an institution independent of the will of states. Misled by this view, many indigenous organizations divert their major lobbying efforts to the UN from the relations that they ought to entertain as a first priority with the governments of the countries from which they come. Some others do so in the hope of circumscribing the powers of states because of their past abuses of power: they posit that these states should cede part of their sovereignty to multilateral institutions, and that they should let indigenous peoples be seated in the UN as equals to states. In her opening address to the 13th session of the WGIP<sup>2</sup>, the chairperson expressed the hope that the UN would become the United Nations of all the peoples, including indigenous peoples. It should not be astonishing therefore that states would want assurances that the international law by which they would be judged should be essentially compatible with their juridical traditions, not least their domestic law.

Even Canada, a state which complies more readily than most with the judgements of experts in international law, holds to the view that the positions

it takes in international fora must be consistent with Canadian policy and practise. In contrast, there are governments which subscribe quite readily to the principles in UN instruments relating to respect for the rule of law, in the full knowledge that they will not have to apply these to their domestic situations. Fine ideals are thought to be fine substitutes for action. Some other governments subscribe to the same principles but do not have the means or the will to enforce them. All bask in the plaudits they receive for subscribing to principles.

Canada is respected in the United Nations for the particular contributions it continues to make in the elaboration of international principles and standards of human rights. Arch-conservative governments see Canada as tending to be too liberal in the field of human rights but this perception is offset by their recognition that Canada proceeds also with rigorous respect for the principles underlying its own juridical systems. In recognition of this balanced approach, Canada often finds itself in the position of being sought out for the role of honest broker, able to find the nuanced compromises that oil the ways of international negotiations and agreements. Canada is known for its skills in reconciling the profound differences which can characterize the approaches different cultures take to the issues of human rights. If there is any real hope of arriving at an agreement on what could constitute internationally a body of collective rights for indigenous peoples, it is essential to call on these so very Canadian talents and abilities to find a way through the maze of competing (sometimes conflicting) interests within states and the disparate approaches which nations take to indigenous situations.

The distinction between a declaration and a convention explains much about the approaches

governments and indigenous groups take when addressing the issues before the WGIP. A declaration, as a statement of principles or aspirations, is not legally binding on states. It does have moral force and can bear some political weight but it remains exhortative. It is believed that some courts might look to a declaration to interpret the intentions of a government with respect to litigation before them. A convention is a legal contract between states upon ratification. Governments are expected to comply with the judgements of the enforcement mechanisms associated with different instruments. These can vary. Governments are expected to submit national reports periodically on their compliance with the provisions of a convention. In other cases, governments may have to submit to certain condemnatory procedures in the CHR. Some states have a reputation for reporting assiduously while others ignore the requirements. Some states use every procedural device available to avoid censure and only when the behaviour of that state becomes unbearably repugnant to the international community is it possible to overcome regional solidarity and muster action to bring that government into line.

Because so many of the articles in the draft declaration have legal/constitutional implications once the declaration becomes a convention, it is tempting for indigenous representatives to want to leapfrog over domestic processes to find shortcuts in the UN and regional bodies such as the OAS. But, governments cannot countenance international agreements that supersede their laws which is why foreign policy considerations in this field remain subordinate to domestic considerations. This is not to say that opportunities cannot be found to use external processes to provoke or revive interest in domestic change.

It is not known whether anybody could have

forecast the vast changes that have occurred since 1969 when the federal government sought to divest itself of its responsibilities for the Indian and Inuit peoples. One can only speculate whether governments would have faced up to the task had they known then where it was all to lead. Other governments which are prepared to take a new look at how their relations with the indigenous peoples of their territories should be defined are aware that they may have less time than Canada has taken. But when they look at how far Canada has gone, and may yet have to go, the perspective becomes daunting unless they can be reassured of a positive outcome with benefits to all in their societies. In the days following the proclamation of the International Year of the World's Indigenous Peoples in New York, several delegations mused openly about the prospects of their governments having the will to come to grips with their pasts when Canada, despite all of its efforts and expenditures, still comes under so much criticism from indigenous communities.

Fifty-three states are elected to the CHR by member states of ECOSOC for staggered terms of three years. Which are the state players and what attitudes prevail when addressing indigenous issues? In the UN, governments have formed themselves into regional blocs for the purposes of negotiating agreements that reflect all of the interests within a region and to develop solidarity to ensure that their common will is respected: Africa, Asia, Central and South America (including the Caribbean), Eastern Europe and the Western and Other Group. This last group (WEOG) includes all of the states of Western Europe, Australia, Canada, Japan, New Zealand and the United States.

In order to cover as many issues as possible, drafting groups with representation from every



geopolitical region are established for every resolution: each representative reports in turn to his or her regional bloc which, for the most part, guides them in their negotiations. The Western Group has more latitude for its members to vote according to their inclinations. Other groups are more prone to voting as a bloc and once they have built a consensus within their group, it is often difficult to persuade their representatives to adopt new positions. Very often, this entails the painstaking persuasion of home governments and delays can carry over into another session when policy changes of a major order are required.

Within WEOG, Canada, Australia and New Zealand (CANZ) often fill in for each other and join with the four Nordic countries and the Netherlands to occupy the liberal end of the rights scale, including issues pertaining to the collective and individual rights of indigenous peoples. Great Britain, France, Japan, Germany and Spain are particularly attentive to questions relating to the rights of minorities: indigenous peoples are minorities from their perspective. For some time, the United States has seemed to be suspended somewhere between these groupings, confident in the domestic dependent nations status of their Indian tribes and unperturbed by claims of sovereignty which could be applied to their situation within the United States, including Alaska, Hawaii and other Pacific territories.

The Eastern European group seems to be drawn intellectually to recognizing rights of indigenous peoples except for the Commonwealth of Independent States, Russia in particular, where there exist fundamental concerns over the rights of minorities.

Asia, with the exception of the Philippines, is not well disposed towards recognizing the rights of



indigenous peoples unless the definition of who they are is confined to indigenous groups of the Americas, Northern Europe, Russia and perhaps Oceania. Bangladesh, China, India, Indonesia, Malaysia and Myanmar (Burma) obdurately reject the proposition that the rights of indigenous peoples be applied to their territories. They press insistently for a definition of who constitutes an "indigenous people" for the outcome could well have an impact on their internal relations with tribal groups. The essence of their argument is that all of their populations have lived on their lands for thousands of years and they cannot accept claims that some are more indigenous than others. Some states such as Malaysia and Indonesia are concerned with integrating the many ethnicities of their societies into one cohesive whole for the purposes of nation building.

The South Pacific Island states are favourably disposed towards recognition of the rights of indigenous peoples because for the most part they consider themselves to be indigenous peoples in their own right. African states empathize with the decolonization arguments of many indigenous groups but are loath to involve themselves in questions of sovereignty which could destabilize some of their border areas. It is a tenet of faith in the Organization of African Unity that border areas intersecting tribal lands are untouchable: articles in the draft declaration referring to cross border issues and any right of self-determination calling into question the integrity of borders can be expected to attract close scrutiny.

Latin America covers the spectrum of attitudes. Brazil is joined in its ultra-conservatism by countries such as Argentina, El Salvador, Guatemala, Nicaragua, Peru and Venezuela. On the other hand, Chile, Colombia and Costa Rica are prone to being liberal minded whereas Mexico and Bolivia gravitate

between both groupings. Overall, this region is likely to be more responsive to rights pertaining to culture than to questions relating to the ownership and disposition of lands and resources. Countries which are contemplating membership in trading arrangements such as the *North American Free Trade Agreement* (NAFTA) are cognizant of the need to take into account public and official opinion about their treatment of indigenous peoples.

Events in Chiapas are exposing an accumulation of shortcomings in the Mexican economy that might have festered for some time without the catalyst of the Zapatista rebellion. There is every reason to believe that similarly deprived indigenous peoples in some other countries might feel equally beset by the prospect of trade agreements and renewed interest in resource developments and be disposed to react in similar ways. There is therefore a vested interest for governments to forestall such awkward interruptions by initiating fresh efforts to address the problems of indigenous peoples, such as the recent agreement of the government of Mexico with the Zapatistas (February 1996).

The Caribbean area with its background of English common law and parliamentary institutions seems favourably disposed towards indigenous claims for recognition of rights. Their general track record and respect for the rule of law suggests that they could play a bridging role between the states of the Americas should one be needed. However, as we shall see later, the issue of defining who is indigenous could intrude politically on this benevolent attitude in the context of the OAS draft declaration.

Eleven indigenous organizations have consultative status with the UN, giving them the right to address the CHR. Among these, The Four Directions

Council (a North American group representing, inter alia, MicMac First Nations), the Grand Council of the Crees (Quebec) and the International Organization of Indigenous Resources Development are uniquely Canadian. The Inuit Circumpolar Conference has extensive representation from Canada. The World Council of Indigenous Peoples, an international NGO, is located in Ottawa. Other groups and individuals from Canada are of course active in UN proceedings. On the other hand, the four national political organizations representing the Indian First Nations, the Metis, the Non-status and urban Indians as well as women only attend multilateral meetings on an occasional basis.

### **The Instruments and Some Issues**

International law is quite thin in its application to the collective rights of indigenous peoples. ILO Convention 107, *The Indigenous and Tribal Populations Convention* (adopted in 1957), has been ratified by 26 countries: Angola, Argentina, Bangladesh, Bulgaria, Bolivia, Brazil, Costa Rica, Cuba, the Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guinea Bissau, Haiti, India, Iraq, Malawi, Mexico, Pakistan, Panama, Paraguay, Peru, Portugal, Syria and Tunisia. ILO Convention 169<sup>6</sup>, adopted in 1989, is designed to supersede Convention 107 as the *Indigenous and Tribal Peoples Convention*. As of the end of 1995, this last convention has been ratified by Bolivia, Colombia, Costa Rica, Honduras, Mexico, Norway, Panama and Peru. It should be noted that all of these have indigenous populations and that Norway and Honduras are new additions. As of the time of writing, Argentina, Australia, Denmark, Fiji and Guatemala have the document in various stages of the ratification process in their respective institutions

of government. None of these conventions are as universal or as complete as it is hoped the UN draft declaration will become<sup>7</sup>.

Between 1982 when the WGIP was established and 1988 when the ILO met to redraft the principles embodied in ILO Convention 107, culminating in ILO Convention 169, relations between member states of the UN and indigenous representatives were reminiscent of the civility which ordinarily dominates proceedings among members of that body. However, the vituperative debates over whether to recognize or not an indigenous right of self-determination, and in so doing accept the usage of the term "indigenous peoples" rather than "indigenous populations", put a bitter end to that harmony. The contentiousness of these interrelated issues has never left any of the "rights" proceedings since then and colours in negative ways, any perception that governments could be approaching the overall issues in good faith and with goodwill or that indigenous peoples are not a wholesale threat to the political and economic interests of nations.

We are not likely to see the ratification of Convention 169 in Canada in the near future. The former Department of Labour of Canada, now folded into the Department of Human Resources Development, has the lead for soliciting and collating the reactions of provincial and territorial governments to the provisions of ILO 169. Some articles clearly apply to their jurisdictions or there are overlaps. Some do not apply directly to Indians or Inuit who come under federal jurisdiction while some may apply to Non-status Indian or Metis peoples who do not. Some provincial and both territorial governments have responded to the invitation by the federal government to comment but until all do, no further steps will be taken by the federal government to ratify ILO 169.

Problems are known to exist with articles referring to traditional occupancy of lands, education and applications of customary law. Needless to say, amendments to federal, provincial and territorial legislation to bring them into line with the provisions of ILO 169 are unlikely in advance of ratification.

As the *UN Covenants on Human Rights* declare, all peoples have a right of self-determination but this has been interpreted by governments to exist only within the sovereignty of a given state. Canada argued in 1988 at the ILO, with others, that the question of self-determination was political and could therefore only be addressed in the political ambit of the General Assembly, starting with debate in the CHR. The question was then relegated to the WGIP for the initial consideration of that group and the eventual disposition of the question in the CHR and above.

Representatives of indigenous peoples have not wavered in their quest for recognition of a right of self-determination at international law, even by the artifice of ancillary issues: for example, usage of the term "indigenous peoples" has been sought for inclusion in the resolutions on the "International Year of Indigenous People" on the grounds that this term would be reflective of the many cultures of indigenous peoples. Canada, with the vast majority of other states in the United Nations, opposes the plural form "indigenous peoples" because it is said to support arguments in favour of a right of self-determination by right of being an indigenous person<sup>6</sup>.

It goes without saying that once the issue of self-determination is resolved, then that relating to "indigenous peoples" falls into place on its own and ceases to be an issue of contention. No other issues except those pertaining to lands and finances as well as retroactivity features are likely to influence the

tenor of discussions as much as those of "self-determination" and "peoples".

Successive governments of Canada have been excoriated by indigenous and non-governmental organizations for refusing to accept the use of the term "indigenous peoples" in legal instruments of the UN, despite official use in the Canadian constitution of the term "Aboriginal peoples". They do not add the precision that the full term in use is "the Aboriginal peoples of Canada", which clearly (by the qualification "of Canada") circumscribes the scope of application to within the sovereignty of Canada.

Expectations to the contrary (stemming from a traditional role in the development of principles and standards), Canada will not promote the acceptance of standards and principles beyond what it is prepared to recognize in its own legal system. The Government therefore reiterates before human rights bodies, the policies which define its relations with the indigenous peoples of Canada. In respect of its fiduciary obligation to fully explain positions it takes on matters of overriding importance to the aboriginal peoples of Canada, the Government goes to considerable lengths to ensure that the reasons behind every position it takes with respect to the draft declaration are stated publicly to all parties. Typical of the position that the Government maintains systematically in all of its submissions to multilateral bodies, is that stated to the 11th session of the WGIP in 1993:

Canada supports the principle that indigenous people qualify for traditional rights of self-determination at international law on the same basis as non-indigenous peoples, if they otherwise meet the criteria at international law. We also support the principle of self-determination of indigenous people within the framework of existing nation-states where there



is an interrelationship between indigenous and non-indigenous jurisdictions that gives indigenous people more autonomy over their own affairs, but that also recognizes the jurisdiction of the state.<sup>9</sup>

Some have sought to deride the importance attached to the position quoted above, accusing the government of Canada of being paralysed by fear of a succession of declarations of sovereignty and from there, secessions from Canada. It is true that such a possibility exists in principle, and might even seem so in reality to a very small number of First Nations. This fear has been overstated by a media which has hyped the issue in the context of the conflicts (James Bay Phase II and sovereignty) between the Cree First Nations of Northern Quebec and successive governments of that province. Still, enough aboriginal groups subscribe to the concept of self-determination at international law as to justify government concern for the disruptive effects such claims can have.

A much more concrete difficulty arises from the very real possibility that some First Nations would enact laws of their own without regard to the surrounding jurisdictions of the provincial and federal governments. Some would argue that this possibility should not be taken seriously either but the National Chief of the Assembly of First Nations called upon the First Nations of Canada to do just this in the immediate aftermath of the Charlottetown debacle when the constitutional arrangements agreed to between governments and the leaders of the Aboriginal peoples of Canada were rejected by an important majority of indigenous communities. There are consequences to the jurisdiction question. For example, the smuggling activities of some communities are justified by statements that aboriginal laws are not being contravened. For another example, a community could be working at cross purposes to the overall goals



of a national, provincial or territorial social policy (eg. health, education) by adopting practises that do not contribute to these goals. Only disorder and disunity of purpose can ensue from such situations.

### **The Antecedent of the International Year**

The UN has decided that an International Decade of the World's Indigenous People be proclaimed for the period of 1995-2004<sup>10</sup>. The complete text of the proposed programme of activities is attached in annex. As the Decade is an extension of the 1993 - International Year of the World's Indigenous People, it might be instructive to review in some detail the process for the Year before turning to the future and the Decade. The more influential members of the WEOG, including Canada, do not favour the proclamation of special years or decades because such commemorations create expectations that cannot be met and result in the diversion of substantial sums of money, energy and intellect with little positive effect.

When the notion of an international year was first mooted, Canada declined to support the initiative. However, the persistence of indigenous groups created some interest among certain countries, some of which sought to camouflage inaction on other indigenous matters behind an appearance of concern. The process for building a consensus began to drift and concerns developed that Canada would be blamed for any fiasco, however little participation it might take in the planning of the Year. Also, it was felt that the much more important processes relating to constitutional renewal in Canada should not be adversely affected by a negative Canadian position on what was seen to be a peripheral issue. The resolution was therefore taken in hand and Canada negotiated the adoption of the first

of a series of consensus resolutions. From being a reluctant partner, Canada moved towards trying to achieve a positive outcome for the majority of the world's indigenous peoples.

The process for arriving at a consensus among member states and indigenous organizations on the series of resolutions on the Year was frustrating for all parties and rarely harmonious. In the first place, few government representatives in Geneva and New York

had much knowledge of indigenous matters and even fewer still had experience with public consultations, be they with indigenous or non-indigenous organizations. Indigenous representatives were naturally anxious to see a reflection in the early resolutions of every conceivable issue that then concerned their communities. They were



*Mrs. Lois O'Donoghue. Aboriginal and Torres Strait Islanders Commission. Geneva 1992.  
[Photo Beatrice Weyrich]*

mistrustful of the common building block technique in the UN of achieving an objective, one resolution at a time.

The process for managing a resolution in the UN is arduous. Normally, it begins at the CHR in February/March when the Commission acts, as in this case, on the recommendations of the Sub-Commission of the preceding calendar year. From inception to adoption in the UN General Assembly, 10 months are required when the process begins in the CHR whereas 17 are needed when it starts in the WGIP in July of the preceding calendar year. Normally, ECOSOC endorses the CHR recommendations in its spring/summer session and passes them on to the fall

session of the General Assembly where adoption occurs. For the most part, amendments are discouraged at ECOSOC and the General Assembly, partly because the delegations at the last two levels do not wish to usurp the mandate and the prerogatives of the CHR, but also to speed up the handling of the many resolutions before that body. State delegations to each body are composed of different individuals for the most part so that the dynamics for negotiation between governments change from Geneva to New York.

Usually, one country takes the lead to draft a resolution and negotiate the contents with representatives of each regional group with the objective of developing a global consensus. Much rounding of corners is necessary to avoid acrimonious debate in the CHR. Canada, having the lead for the draft resolutions on the Year, developed a strategy to overcome resistance to amendments by building progressively on successive resolutions in the CHR, ECOSOC and the General Assembly with the longer term aim of accumulating as many of the main issues as possible by the time for proclamation of the Year. The strategy worked. Some indigenous representatives accepted the strategy as a means for broadening support for the resolution. As experience would show over time, the Year resolutions would evolve to eventually incorporate almost the totality of what indigenous representatives were seeking with the exception of the self-determination and "peoples" issues.

From the outset, difficulties were encountered regarding the validity of consultations. Sessions of the CHR and the UN General Assembly were attended by only a small number of indigenous representatives (usually the same) which resulted in government representatives constantly questioning the representativity of their interlocutors. For Canadian

groups, accustomed to access to all levels of government, the restricted opportunities for meeting with delegations were frustrating. For many other indigenous organizations, any kind of meeting was a welcome and enlightening departure from their experience. Resentment was often expressed by some of the representatives from Canada that they were not the drafters of "their" resolutions and that they were not directly involved in the negotiations over text among state parties to the resolutions. Their exclusion naturally raised questions among them as to the sincerity of the efforts being made on their behalf when all that they wanted was not obtained. In reality, no amount of consultation would have sufficed for the more militant indigenous representatives wanted control of the process as a manifestation of their right to equal status with states at the UN.

The Year resolutions<sup>11</sup> were not Canadian resolutions as some Canadian aboriginal groups were prone to charge. Canada drafted the resolutions on behalf of a representative grouping of countries (Australia, New Zealand, Scandinavia, Mexico, Colombia, Brazil, Chile and Nigeria) from each bloc. It was incumbent on Canada to consult first on its drafting with this group and to make amendments in accordance with their wishes before showing it to indigenous representatives. Those indigenous groups which did not allow themselves to be discouraged discovered that further suggestions for amendments materialized more often than not in the final texts or later resolutions, except for questions relating to self-determination. As is most often the case in the UN, negotiations occur out of sight and hearing, often in informal locations.

Controversy was injected into the discussions in the very first resolution when indigenous groups insisted on replacing the term "indigenous

populations" with "indigenous peoples". As an interim measure and in the hope that in time scholars and human rights experts would arrive at a solution to the scope of application of the term (satisfactory to governments), Canada persuaded other governments to accept the term "indigenous people", albeit in the singular mode. Many indigenous groups later repudiated the compromise. This illustrates the difficulty of consulting and negotiating in situ when indigenous groups have only the most limited presence: they are called upon to use their best judgement of what will fly later yet they are inevitably second guessed by absentees to the process. Indigenous representatives do not have the means to consult with their community leaders as do government delegations with their capitals. Even if they do, their consensus building approach to decision making is not conducive to the on the spot decision making in the resolutions process. This needs to be taken into account when governments address the draft declarations for if they act with impatience and adopt amendments as they proceed, they will encounter resistance and rejection of their efforts, however well intentioned.

Even the selection of a theme was difficult. Governments at the UN had no thoughts to propose on the subject and so Canada turned to the aboriginal participants from Canada for advice. After several meetings, an aboriginal consensus emerged around the use of the term self-determination. The term and variations of it were rejected by governments before Canada resumed negotiations in New York where Canada proposed finally that a theme of "a new relationship" be considered. Spanish speaking interlocutors thought that the term could be misconstrued and proposed instead that a theme be built around "partnership". The theme (adopted later for the Decade), has now been expanded to being "Partnership in Action".

From the outset, countries held different views on what they expected from the Year. Interestingly enough, these views were being advanced in parallel but independently by indigenous groups from the same regions. For example, all indigenous groups were interested in pursuing their political agenda but groups from the developing world were prepared to lessen the emphasis on political rights in favour of an approach that would provide more immediate economic and social benefits to their communities. Their governments saw the Year as an opportunity to obtain a reallocation of multilateral and bilateral development funds in their favour. Therefore, a consensus was negotiated by setting the first resolution on a course of political/human rights and economic/social/cultural development, with emphasis on the latter.

As well, Canada accepted the indigenous view that most governments represented in the UN, starting with the CHR, needed to be educated to the indigenous dimension of their societies and that if a positive outcome were to be sought for the declaration process, the third world would have to become implicated in a continuing dialogue with indigenous groups. There was a genuine concern that without such a dialogue, governments would approach the eventual consideration of ideas for the declaration without an adequate understanding that the process could offer them opportunities to develop more positive relationships with the indigenous peoples of their regions. Starting with the CHR, it was hoped that demonstrable success could be replicated elsewhere in the UN system, particularly in its development aspects.

Thus, the goal of the Year evolved to the formulation of reinforcing international cooperation to find solutions for the problems of indigenous peoples in



areas such as human rights, the environment, economic development, education and health. This goal and the objectives of the Year have been adopted also for the Decade with specific objectives added such as the adoption of the draft declaration and the establishment of a permanent forum.

Canada was the only country to send a Minister to the official proclamation of the Year in December, 1992. In presenting the resolution for adoption and in her address to the General Assembly, the then Minister for External Relations set as her theme, the "Opening of Doors of Opportunity" that the Year provided. The ILO responded immediately after with workshops on how indigenous communities could access the various UN development agencies and their programmes. Indigenous organizations asked that these agencies be called upon to develop statistical data particular to indigenous communities so that their situations could be understood and their problems be specifically targeted. It took two more years of building trust and confidence among government delegations before gaining acceptance for the request through the resolutions process. The Decade process is the beneficiary.

Another important provision for the protection of political and human rights was introduced by Canada into the last resolution on the Year and the first Decade resolution at the suggestion of the South American expert on the WGIP. Henceforth, special rapporteurs, experts and so on are called upon in the exercise of their respective mandates to take into consideration the particular situation of indigenous peoples. This process has real potential for focussing international attention on the plight of indigenous communities under particular stress. When indigenous groups learn how to make use of it, they will be able to project their specific grievances into CHR debate



through the good offices of governments rather than NGOs who do not command the same attention. Only governments of the CHR mandate the experts, receive their reports and sometimes act on them.

At the behest of indigenous groups, Canada persuaded other co-sponsors of the resolution to entrench a provision for a series of working sessions to assist in the preparations for the Year, identify obstacles and to encourage different components of the UN development system to establish special working relationships with indigenous communities. A post-Year evaluation mechanism was also incorporated in the resolution to assure indigenous participants that their views would be reflected in any final report to the Secretary-General of the United Nations. Special study sessions, planning and evaluation mechanisms are now features of the annual meetings of the WGIP and the Decade.

Financing and procedures for managing the proposed activities for the Year left much to be desired. In accordance with UN custom, a special voluntary fund was established to receive contributions from member states, indigenous and non-indigenous donors. UN agencies were expected to reallocate resources from within their respective budgets. Some indigenous representatives sought to have the control over the funds vested in the Secretary-General's economic office where it was thought that more weighty influence could be brought to bear on the major funding agencies of the UN such as the United Nations Development Programme (UNDP), the UN Children's Fund (UNICEF) and the International Bank for Reconstruction and Development (IBRD). Member states of the CHR declined to support this proposal on the grounds that it would undermine CHR efforts to be a meaningful player among multilateral agencies and affect its credibility as a promoter of respect for human

rights. At the CHR, Canada and other members of the Commission had supported a resolution designed to reinforce the role of the Commission. They could not undermine it in the same breath by delegating one of its new responsibilities to New York.

Regrettably, indigenous misgivings were proven to be well founded. In exchange for maintaining responsibility for managing the Year in the CHR, officials of the CHR promised their full support to staff an indigenous unit in Geneva. This support never materialized. The unit was staffed eventually by secondments of able indigenous persons from Australia and the Nordic countries. Contributions to the voluntary fund were not managed to the satisfaction of indigenous groups and some governments (including Canada). These contributions came only from the same small number of states that normally support such funds such as CANZ and the Nordic nations, but some countries such as France (thanks to the personal intervention of Mrs. Mitterand) and Japan (thanks to an appeal from the Chairperson of the WGIP) gave as well. Total receipts of about US \$530 thousand (against project requests in excess of US \$30 millions) were grossly inadequate even if only model projects were to be supported.

Domestically, early hopes that the national aboriginal organizations would agree on the establishment of a single secretariat, independent of government, were dashed by the refusal of the Assembly of First Nations (AFN) to work cooperatively with the other three organizations and by the understandable refusal of these last three to subordinate themselves to the AFN. Faced with the prospect of four demands for funding of separate secretariats and a proliferation of separate programmes, the Government turned instead to a reordering of resources from within federal

government departments and the coordination of their use by a body of officials. Many of these found very creative ways to respond.

The major political organizations of Aboriginal peoples pouted the domestic process and denigrated government efforts to support the objectives of the Year. Nevertheless, a great many indigenous communities made quite remarkable efforts to respond on their own, as the Government highlighted in its report to the UN Secretary-General on the activities of the Year. A notable example was the initiative taken by John Kim Bell, a renowned symphony conductor of Mohawk descent, who raised the money from governments and corporations to establish an annual Aboriginal Achievements Awards to honour aboriginal individuals for lifetime contributions to the betterment of their societies. The first two ceremonies have been televised nationally with notable personalities in attendance such as national aboriginal and community leaders, the Prime Minister, members of his cabinet and so on. The Awards are now an annual fixture as the third, with support from governments and the corporate world, will be held in Winnipeg this year. Many communities raised money on their own to commemorate the Year by educating people to the aboriginal dimension of Canada. Some raised money to participate in events with indigenous peoples elsewhere such as with the Maori youth in their run through New Zealand. Regrettably, no definitive list of aboriginal accomplishments during the Year has yet been drawn up although as much as was known was referenced in Canada's report to the UN.

The Year but confirmed the need to address the development problems of indigenous communities on a longer term basis and that a decade was needed to accomplish what the Year could not. Many indigenous groups concluded that the Year had failed them

because permanent solutions to their needs had not been met. This was manifestly impossible. Yet, some progress was made. At the technical conference preceding the 12th session of the WGIP, the Nordic countries announced that in their cooperation programme policies, the indigenous rights records of recipients would henceforth be taken into account in the allocation of funds. It is not known whether the Canadian International Development Agency (CIDA) made a similar assessment with a view to following suit nor is it known whether aboriginal groups pressed them to do so. The Year did succeed in sensitizing the UN development system to the amplitude of problems facing indigenous communities in their respective societies. This sensitization facilitated acceptance for the Decade by governments when the process was recommended in the final report of the International Conference on Human Rights, held in Vienna in 1993<sup>12</sup>.

### **The International Decade**

The Vienna Conference was not propitious for the elaboration of new categories of rights. Enthusiasm among governments for the Conference ranged from non-existent to indifferent through a tepid acceptance for the need. Preparatory discussions concluded with a draft report and recommendations that were so qualified that there was some question whether the Conference could achieve any kind of meaningful consensus. From the outset, the Western Group, supported by the East European and South American Groups, settled on a strategy to not allow the reopening of discussion on any item of business that had escaped qualification. The paragraphs relating to indigenous issues, except for a technical correction, could therefore not be reopened even if they fell far

short of what indigenous representatives were seeking.

Indigenous representatives sought without success to have their issues placed on the main agenda. Still, the inclusion of indigenous concerns in the final conference report, the preservation of the recommendations regarding proclamation of a Decade and a process for giving consideration to the possible establishment of a permanent forum, were significant achievements. Had a debate been allowed, there is every reason to believe that these specific gains might have been excised and replaced with little more than the broadest generalities.

Attention then focussed on the primary objectives of the Western Group. First, the establishment of a permanent Deputy Secretary-General position as High Commissioner of the CHR with an expanded mandate and authority to intervene in situations of gross violations of human rights (hereto reserved to the Security Council). Secondly, to develop new approaches for addressing the problem of violence against women.

The process for proclaiming a decade was initiated at the fall 1993 session of the UN General Assembly. Australia sought the lead for drafting and introducing the first resolution which incorporated all of the elements of the Year resolutions, including the theme, the goal and the objectives. A full year was set aside to provide the time and the opportunity for indigenous groups to plan the activities and to set their objectives before the actual start of the Decade. The process drew a greater number of governments into the negotiations than ever before. These revealed that a number of governments from the Asian and South American regions would be punctilious in preserving their prerogatives as states. Any attempt to foster a direct relationship between indigenous communities and the development agencies of the UN that would

bypass governments would be rejected.

Since 1993, indigenous groups and government representatives have taken full advantage of the work session approach to plan for the Decade. Interest has been high: 32 governments, 9 UN agencies, 13 non-government organizations with consultative status (eight indigenous), forty other indigenous groups and 38 other groups attended the three day technical meeting which preceded the 13th session of the WGIP<sup>13</sup>. They reported the following:

The original and now the more specific objectives are to:

1. Strengthen international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, health, culture and education;
2. Bilateral and multilateral development agencies should devote special attention to development activities of benefit to indigenous communities;
3. Educate indigenous and non-indigenous societies concerning the situation, cultures, languages, rights and aspirations of indigenous people;
4. Promote and protect the rights of indigenous people and their empowerment to make choices between retention of their cultural identity while participating in national life;
5. Further the implementation of the recommendations pertaining to indigenous people of all high level conferences, in particular the establishment of a permanent forum; and,
6. Adopt the draft declaration on the rights of indigenous peoples, develop further international standards and national legislation for the protection and promotion of the human rights of



indigenous people, including effective means of monitoring and guaranteeing those rights.

From the abbreviated list of the objectives outlined above, it should be noted that the establishment of a permanent forum and adoption of the draft declaration are singled out. Both issues are being actively considered by governments and are therefore more immediate in importance, particularly the draft declaration.

No particular priority seems to be attached to the objectives except to note that item 1 is described as the main objective while item 3 is qualified as being a major objective. Success in meeting the objectives is to be evaluated by quantifiable outcomes midway and at the end of the Decade. The draft programme of activities divides these into actions to be taken by the United Nations system, regional organizations such as the OAS, member states, indigenous organizations as well as NGOs and other parties such as the media and business. It is beyond the scope of this paper to comment on the activities proposed for UN and regional bodies. However, a few comments regarding the activities being proposed for others might be useful as they are detailed in annex to this paper and to the *Report of the Technical Meeting on the International Decade of the World's Indigenous People*.

Briefly, member states are called on to:

- 1) establish national committees;
- 2) intensify coordination and communication;
- 3) allocate part of ODA to benefit indigenous people;
- 4) develop national plans in collaboration with indigenous communities;
- 5) provide adequate resources for indigenous communities to develop their own plans;



- 6) increase knowledge among non indigenous populations;
- 7) consider ratification and implementation of ILO 169;
- 8) legally recognize rights of indigenous people;
- 9) implement chapter 26 of Agenda 21 of the UN Conference on Environment and Development<sup>14</sup>.

Indigenous groups are asked to:

- 1) establish an information network linked to the Coordinator;
- 2) develop information for local communities concerning the goals of the Decade and activities of the UN;
- 3) establish and support indigenous schools;
- 4) create documentation centres, archives and in situ museums to inform and educate non-indigenous people;
- 5) establish and support indigenous media networks;
- 6) communicate to governments, the UN and regional organizations, the programme concerning their activities.

NGOs are asked to:

- 1) cooperate with indigenous organizations in the planning of their activities;
- 2) involve indigenous people in their indigenous programmes;
- 3) promote indigenous cultures;
- 4) involve different social and cultural groups.

Given that a year was added to the Decade to provide indigenous organizations time to plan a more

comprehensive programme based on their experience with the Year, and given that this is the sparse outcome from two technical conferences on the Decade, the results are disappointing.

The general objectives are clear but there is little evidence that much thought has been given to specific programmes and activities that benefit communities in material ways. Conferences, workshops, technical meetings etc. are easy substitutes for the hard slogging required for community development. The same people will attend the talk fests while the same "other" people will wait in their communities for the changes promised by the Year, and now the Decade. The Decade programme is long on process and short on substance.

In December 1992, the ILO convened the first of two technical conferences to promote access of indigenous communities to the development system of the UN. Three years have passed and there is little evidence the indigenous communities know much better how to avail themselves of UN programmes or that joint processes with governments have been devised for accessing technical and financial resources. Beyond claims by some UN agencies, little is known about the success rate of this transfer of knowledge.

In Canada, the government seems to be waiting for aboriginal organizations to come together with a plan of action and an organization to manage it. The Minister of Indian Affairs did meet with aboriginal organizations in early January 1996 but the discussions were reported to be inconclusive. Where the government can take initiatives on its own, little has been started. For example, the Canadian ODA budget, managed primarily by CIDA, has not in the least been adjusted in favour of indigenous communities in Central and South America where a

sharper focus could support and meld a number of domestic priorities (free trade, aboriginal development, human rights etc.). For another example, if national organizations persist in disagreeing among themselves on a joint approach, perhaps local bureaucracies at the interface of local communities could start planning together. In fact, it is at this very level that action should be taking place. Indigenous communities demonstrated vividly what they could accomplish without government during the Year, proving that government funding need not be a *sine qua non* for achieving the objectives of the Decade.

In the meantime, work progresses on other fronts, particularly in relation to the UN draft declaration, now an objective of the Decade. A working group of governments represented at the CHR met in Geneva for the first time in the latter half of November 1995 to begin their consideration of the draft declaration. In anticipation of other meetings to come, it might be useful to briefly review other activities bearing on the contents and the outcome of the UN and the OAS draft declarations, such as the Sub-Commission study of the treaties between governments and indigenous groups, the Sub-Commission study on indigenous cultural properties. Progress on the adoption by states of ILO Convention 169 has been commented on earlier in this paper. An activity that might just well end with having as much overall importance is the development in the OAS of a draft declaration on the rights of indigenous peoples.

### **Study of Treaties, Agreements and other Arrangements**

For indigenous peoples, the Aboriginal peoples of Canada in particular, treaties are of tantamount

importance. If accepted by states as international in status, the existence of treaties would support the claims of indigenous groups that they were once sovereign nations, equal to the states with which they signed treaties. More germane, they symbolize the aboriginal relationship to the Crown with all the attendant attributes of protection and benefit in exchange for use of land. In their sum, these attributes have come to be interpreted as the fiduciary obligation of the Crown to the Aboriginal peoples of Canada.

In 1988, authority was given to a special rapporteur of the Sub-Commission to prepare a report on "Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples" <sup>15</sup>. The purpose of the report is to determine whether these have any bearing on the situation of indigenous peoples and whether the experience has any relevance to the present.

It should be noted that to date, the Special Rapporteur has concentrated almost exclusively on treaties negotiated in countries with a tradition of English common law. Limiting his studies to this tradition takes away from the universality of approach which ought to guide the development of concepts applicable to the world of the United Nations. The judicial tradition that has developed out of Roman law, whether tempered by the experience of Iberian, Scandinavian or other systems, would surely offer additional insights into issues such as the ownership or tenure of lands. We are left to suppose that in the history of South Asia, China or elsewhere, equivalent arrangements for similar situations between indigenous peoples and the authorities that governed them never existed. Indigenous groups seem to share this view because on more than one occasion, they have asked that the Special Rapporteur extend his analysis into unstudied areas: the 51st session of the

CHR responded by mandating him to review archival material in the Vatican to determine the impact of their treaties on indigenous populations. This could provide a partial view into the experience of indigenous peoples in the former colonies of Spain and Portugal, and the states which succeeded them. So far, no studies have emerged.

It seems strange that anyone would want to repeat the experience of the American and Canadian treaties. Neither governments nor indian groups are pleased with the ambiguities of these arrangements, even though the latter cling to the treaties for lack of any better assurance of their permanent relationship to the former. A study of a number of contemporary arrangements would be more relevant than the treaties of centuries past, such as: the relationship between Denmark and the Home Rule Government of Greenland, the Sami parliaments of Scandinavia, legislation establishing the Territory of Nunavut in Canada or the agreements on comprehensive land claims in the United States (Alaska) and Canada. It should be noted that in Canada, comprehensive land claim agreements are recognized as modern treaties; as such, their provisions come under the protection of the Canadian constitution.

The CHR also asked the Special Rapporteur to "make every effort" to complete his task in 1996. As little progress is reported to date and there is no reason to believe that lost time can be regained, one is left to wonder whether this work can provide useful or timely insights for the deliberations on indigenous rights in the UN and the OAS. So far, the Special Rapporteur's two progress reports have informed readers only of how he has proceeded in his research and how he intends to proceed in the future. These are work plans. After six years it might be best to call a halt or refocus the effort on contemporary

arrangements alone. If the historical record needs to be explored because it buttresses the claim for recognition of a separate category of collective rights, then the mandate should be expanded to cover all experiences.

The Honorable A.C. Hamilton was given a mandate on December 22, 1994 by the Canadian Minister of Indian Affairs and Northern Development to "consider the feasibility of not requiring a blanket extinguishment of aboriginal rights or title in future land claims agreements" or "...to cede, release or surrender" rights to land in exchange for defined rights and benefits set out in a treaty<sup>16</sup>. The concomitant issue for him to address, of equal importance to the first issue of extinguishment, was whether there are ways to provide "...certainty (of extinguishment) ... without requiring a surrender of aboriginal rights"<sup>17</sup>. Governments demand that a finality be attached to any agreement to ensure that interests will not again be brought into question by a reopening of negotiations.

In contrast to the six (almost seven) years it has taken the Special Rapporteur of the UN to report little more than his work plan, Justice Hamilton reported his concrete solution to the Minister on June 11, 1995: to construct a treaty that would recognize the existence of aboriginal rights and provide certainty with respect to the future rights of all interested people. Unlike treaties of the past, a detailed spelling out of the rights of both sides would be necessary. It was perhaps not possible to include in the Special Rapporteur's progress report, the conclusions of Justice Hamilton. But, it seems odd that even the mandate was not acknowledged. On the other hand, it was perhaps indicative of the relevance of the UN process on treaties that it received no acknowledgement either in "A New Partnership"<sup>18</sup>.



## **The Study of Cultural Properties**

A Special Rapporteur was also appointed by the Sub-Commission to review issues relating to the cultural properties of indigenous peoples<sup>19</sup>. This study is now complete and contains a number of conclusions that depart for example, from copyright practise or traditional property rights. To illustrate, who owns a folksong or an incantation that is adopted (for commercial purposes or not) outside of its traditional homeland? Or, who owns the chemical structure of a fungus that in its natural state is used in traditional medicine? How does one impose or collect royalties on musical or literary themes from a more or less distant past that have become the property of mankind: it is not uncommon, for example, for popular music to "reinvent" a musical phrase from a classical number. Issues such as these are universal and not unique to the indigenous situation.

The draft declaration of the WGIP and the proposed OAS legal instrument contain sections relating to cultural rights. Some governments might see these sections as having the most promise for an early resolution to some indigenous claims of rights because they do not necessarily have to be linked immediately to self-determination issues. The Working Group of governments in Geneva might want to consider in their next session whether a sub-group should not give parallel consideration to the cultural properties study, while the draft declaration is being considered in plenary. There may be a need for a number of similar groups to address the specifics of certain other provisions of the draft declaration such as those pertaining to lands.



### ***The Inter-American Declaration on the Rights of Indigenous Peoples***

Canada intends to ratify the *Inter-American Convention on Human Rights* but will do so only upon completion of consultations with provincial and territorial governments. A fundamentally important aspect of this system is the Inter-American Commission on Human Rights and the Court. Canada works with the Commission but has yet to accept the jurisdiction of the Court (the Commission has heard cases from Canada, primarily relating to deportation proceedings or has received complaints without acting on them). The consequences are straightforward. Legally, Canada cannot be brought to account for actions that contravene OAS human rights instruments. Politically, its capacity to promote respect for the rule of law is diminished and its freedom to intervene in the more egregious actions of some member states is weakened.

Without going into detail, there are some notable differences between the rights instruments of the OAS and the UN. For example: there is a provision in the OAS system that allows an individual to carry a complaint to the Court on Human Rights and to seek redress by means of appropriate compensation. Admittedly, the process is not easy to pursue but then, nothing worthwhile ever is.

As was noted earlier in this monograph, consistency between international and domestic law is a constant of state parties. Discrepancies mean that governments must find ways to reconcile the differences, a difficult task in the case of a federation where jurisdictions are divided and where laws within jurisdictional areas may not necessarily be the same in each equivalent jurisdiction such as the provinces and territories of Canada. There are times when adhesion

to the axiom of consistency has not been as close as it ought to have been such as in the case of ILO Convention 169 where Canada voted for the adoption of the text in advance of agreement with provincial governments. As Renee Dupuis notes: "Le Canada ne ratifie un tel texte que si les treize législatures consentent à cette ratification et s'engagent à en appliquer les dispositions dans leurs champs de compétence respectifs."<sup>20</sup>

The same problems that are associated with the ratification of ILO 169 risk arising for the draft declarations of the UN and the OAS unless the representatives of the Aboriginal peoples of Canada and the federal government initiate a dialogue on the differences that separate them before the government engages itself in negotiations with other state parties. By now, provincial and territorial governments should have commented on the provisions of these two documents to clear the way for discussions with aboriginal groups, yet they seem not yet to have been invited to do so. The task of reconciling all of these parties at a later date will be more challenging than for ILO 169.

It would be very important for indigenous representatives to participate in the elaboration of the draft declaration of the OAS. For now, they are excluded unlike the process in the UN. Canada did intervene energetically in its initial presentation to the experts of the Inter-American Commission on Human Rights to obtain for indigenous peoples the right to represent themselves, directly to the Commission, without necessarily being part of a government delegation. Canadian representations were ignored. The Government should be called upon to renew its request at every stage of examination and approval of the draft declaration and to seek support for its position from a number of other like-minded states.

A strategic question lies in the attention and priority to be given to the draft declarations of the UN and of the OAS. The 1993 Declaration of Chimultenango, sponsored by Nobel Prize winner Rigoberta Menchu Tum, concluded the second summit of indigenous peoples with a statement that noted, *inter alia*, that every effort be made to ensure that the legal instrument of the OAS be made to conform as closely as possible with the draft declaration of the UN but that priority should be given to preserving the integrity of the declaration as drafted by the WGIP. There is little prospect that governments will heed indigenous demands that the UN draft declaration be adopted as is or amended only according to their liking.



*Left, Mr. Antonio Gonzales and, right, Mr. Roberto Cruz. IITC representatives. Geneva 1995.  
[Photo Beatrice Weyrich]*

The indigenous peoples of the Americas might well find advantage in playing the OAS option with the same intensity as they give to the UN process. They are concerned, perhaps with reason, that a regional document could be interpreted in UN circles as representing the outer limit of their rights, and if they participate in its process of approval then they are irrevocably associated with the result. Such a danger always exists with respect to any process. Nevertheless, the declaration has been drafted to include diverse elements drawn from the UN draft declaration, ILO Convention 169, Agenda 21 of the Rio Conference on the Environment and Development, some recommendations issuing from international conferences and the responses of certain states to the drafting of the first version of the draft declaration by the experts of the Inter-American Commission on Human Rights. This is not such a bad stepping stone to the future.

One would expect that the rights incorporated in a document made "In the Americas" would be the minimum level of rights that states from the Americas would be expected to support in the UN. Indigenous peoples might well find advantage in viewing the draft declaration of the OAS more as the foundation upon which additional features can be built than as a ceiling beyond which they cannot aspire.

Up until now, no formal consultation has occurred between the government of Canada and aboriginal representatives regarding the draft declaration of the OAS.

### **A Permanent Forum**

As indigenous groups or First Nations do not have the status of a state at the UN, they are seeking to entrench a permanent presence in the very heart (ECOSOC) of that institution in New York. As has been noted in the comments on the voluntary fund for the Year, New York is deemed to be more attractive as a centre than Geneva because the Office of the Secretary-General, the Security Council and a multitude of funding agencies are located there. It is true that the coordination of development programmes comes under the aegis of the UNDP but the real levers are located in the particular agencies such as, for example, the IBRD and the International Monetary Fund (IMF) in Washington, the UN Education, Scientific and Cultural Organization (UNESCO) in Paris, the Food and Agriculture Organization (FAO), the World Health Organization (WHO) and the ILO in Geneva. Moreover, now that the Commission on Human Rights has an expanded mandate and more latitude to act on its own, it would not seem to be productive to attempt the establishment of a permanent institution for indigenous peoples

anywhere else than in Geneva. As all of the political, economic, social and cultural rights are reflected in the totality of UN declarations and conventions, indigenous peoples have a better chance of making their mark in the UN system through the human rights process than the political process which would create a precedent (not the first) that few would accept. Other groups such as the Romani or ethnicities living astride multiple borders (i.e. Kurds) would be vying for similar treatment.

It is understandable that indigenous peoples should seek recognition as states. Some supporters speak of the strong possibility that indigenous peoples will receive eventually some level of representation and a formal right to vote at the United Nations. They would have us believe that on the way to getting there, indigenous peoples could obtain some form of observer status in the UN General Assembly as now exists for certain observers states such as the Vatican or certain liberation movements such as the Palestine Liberation Organization. It would be foolhardy to forecast the impossibility of such proposals for the improbable is not an unknown phenomenon in the UN. Nevertheless, the pursuit of such improbabilities diverts indigenous leaders from the more important problems of underdevelopment in their communities and the task of negotiating real protections of rights. The simultaneous pursuit of too many objectives more often than not leads to the non-achievement of any.

The fact that a study group, mandated by the CHR, met in Denmark before the 13th session of the WGIP, to discuss the make up of a permanent forum should not be interpreted necessarily as a general sign of interest, much less support, for the establishment of such an institution. Certainly, states such as Denmark (on behalf of Greenland) are sincere in promoting the establishment of such a body. For many others, the

gesture of listening until all of the arguments are exhausted is less taxing than to be upbraided about more concrete issues in other fora.

Most states, including Canada, place a high priority in their multilateral policies on seeing to the efficiency and effectiveness of UN institutions. The creation of new institutions within the UN system just does not figure in these policies, particularly when the financial situation of the UN is taken into account. The cost of peacekeeping, the breakdown of political, economic and social order in several parts of the world and the downsizing of the UN itself are reasons alone for member states to discourage expansionary initiatives.

A number of governments are of the view that an institution built on practises and procedures that are now in place has a better chance for acceptance and certainly provokes fewer challenges. Following this line of thought, many countries favour the continuation of the WGIP as the basic building block for the eventual creation of a permanent forum. They state that if after a reasonable time of testing, the WGIP were unable to be made to function in accordance with indigenous needs, they would be prepared to reassess their position and look at other arrangements. In any event, indigenous representatives have requested that the WGIP continue to function even if a permanent forum were established (the proliferation of institutional arrangements not going unnoticed by the censors of UN inefficiency and ineffectiveness). Most countries are open to a discussion about the present mandate of the WGIP and membership in that body. The study group discussions can be expected to provide some thoughts that could be transposed to how the WGIP mandate could be expanded. The composition of the WGIP is an example of how this body can be remolded to suit the purposes of indigenous peoples.



There is nothing sacred about its composition except that it has to be representative of the five major geopolitical regions of the globe and members have to be appointed from the Sub-Commission.

Governments could undertake to present a slate of persons with expertise on indigenous matters, including indigenous persons, for election to the Sub-Commission as experts. The short listing of candidates would have to be worked out between indigenous groups and their governments. This would not be the favourite option of those who believe that they have an inherent right to represent themselves but it might mark some progress for some peoples. An example already exists to support this possibility: Jose Bengoa, Head of "La Direccion Indigena de Chile" was elected to the Sub-Commission in 1994 (Mr. Bengoa sat on the WGIP in 1995 as the alternate to the expert who normally represents the Central and South American region). His alternative representative is Mario Ibarra, a Mapuche indian of Chile. Another possibility would be for each of the five experts of the WGIP to invite one or more indigenous persons from each of their respective regions to advise them on the substance of their work. Other ideas will emerge and whichever ones best satisfy criteria of credibility, usefulness and effectiveness for all parties, have the best chance of acceptance.

Governments do not seem to be inclined to give much of their time to the study of the permanent forum question. Denmark is the only country to pull together a think piece on the subject that seeks to look at various precedents from the UN system. The CHR has the proposal before it since 1994. In 1995, it requested that the issue be studied by a very small number of interested parties in advance of the 13th session of the WGIP. In their report to the WGIP<sup>21</sup>, it is noted that:



1. The mandate should be broader than human rights and the forum should report to ECOSOC;
2. Membership should be indigenous and non-indigenous;
3. Another workshop should be held before the next WGIP.

At the WGIP, Colombia, Norway, Chile and many indigenous representatives supported the report. One member of the WGIP proposed that the forum report to the Commissioner of the CHR and be composed of five government officials, five indigenous representatives and five experts or that it be composed of six representatives each from government and indigenous peoples and three experts. He underlined that the composition should not exceed fifteen but did not explain why. The same expert noted that the forum's function could be to monitor government actions with regard to the provisions of the declaration and act as a clearing house for complaints. He suggested that a special rapporteur be appointed and be sent to countries where human rights problems exist <sup>22</sup>. All of these comments are within the bailiwick of an expanded mandate for the WGIP and could be acted on very quickly if attention were focused in that direction.

The WGIP will convert the above comments into recommendations for the Sub-Commission to pass on to the CHR. No decision is likely in 1996 since another workshop is being proposed <sup>23</sup>.

Member states of the CHR are pointing the WGIP in the direction of an enlarged mandate, a hint perhaps of how they will deal eventually with the matter of a permanent forum. The mandate resolution on the WGIP from the 51st session <sup>24</sup>, requests that body to deliberate over the reports of special rapporteurs, special representatives, independent experts and

working groups who in the exercise of their mandates and their responsibilities have taken into account the situation of indigenous communities (previous resolutions on this subject only requested these people to take into account the situation of indigenous communities in their reports). For the first time, the responsibility for following up on the reports about indigenous situations is given to a UN body, the WGIP. Presumably, the WGIP can now monitor reports and can begin to bring to the attention of the CHR any failure of the rapporteurs etc. to note applicable indigenous situations or can call upon this body to act when systemic and gross violations are substantiated.

The same resolution requests the WGIP to consider what use can be made of indigenous expertise<sup>25</sup>. This recognizes the acceptability of changing the roles of indigenous persons at the WGIP, procedurally and with respect to its present composition. Even though these two initiatives might seem modest, they are really significant because they open the door to integrating indigenous persons with the UN system. The political marginalization of indigenous peoples is reduced in consequence.

Finally, it is conceivable that the experience acquired within an expanded WGIP could pave the way towards the eventual establishment of a more probing body in the UN. It is quite conceivable that a sub-commission (separate of the Sub-commission on Prevention of Discrimination and Protection of Minorities), reporting to the CHR with a mandate based on monitoring the substance of the draft declaration, could be created, if not for the implementation of the declaration, then certainly for any convention that emerges therefrom. A sub-commission in turn could mandate working groups to study in depth any particular problems that might arise such as the interpretation of the provisions of the

declaration (or convention).

The WGIP has requested a report on all of the activities in the UN relating to indigenous peoples<sup>26</sup>. This account is to be considered when another seminar on a permanent forum is convened in 1997. The issue remains live at least until then. In the meantime, the notion of a forum can be expected to pass through several mutations as a result of the discussions over the draft declaration.

### ***The Draft Declaration on the Rights of Indigenous Peoples***

It is possible that the experts of the WGIP have overplayed their hand and have committed a strategic error in drafting provisions of the declaration in language that is more akin to a legal instrument than a declaration of principles. Even if the declaration were not binding, the precision of its language and the style in which it is written could be interpreted by courts as being indicative of the intentions of the sponsors. An articulation of principles in more general language that is not binding on governments, would therefore be less threatening and could be approached with more openness of spirit. But, this is not likely to be.

The 13th session of the WGIP is informative of indigenous views<sup>27</sup>. They are concerned that governments wish to start from scratch and not use the draft declaration as the basis for discussion. They wish to see the draft declaration preserved as it is or amended only to "improve" its provisions. There is concern about the participation of indigenous representatives in light of the certification procedures. A spirited but unresolved debate over defining who is indigenous and what criteria are to be applied confirms how divisive

this issue could be for indigenous peoples. CANZ delegations support the principle of full and open participation of indigenous peoples in the consideration that is to be given to the draft declaration. Some seek the continuing elaboration of rights while others are of the view that they ought to proceed immediately to drafting a convention.

The CHR resolution to establish a working group of governments encourages the working group to give consideration to all aspects of the draft declaration, including the scope of its application<sup>28</sup>, an euphemism for determining to who the declaration will apply. If tribal societies from Asia are defined as indigenous (as is the case with the draft declaration), most of their governments will go through the provisions of the draft declaration with a finer tooth comb than if the declaration were applicable only to non-Asian indigenous peoples. If the indigenous peoples of Asia were to be excluded from the application of the declaration, this instrument would lose its universality of application, one of the most basic of principles in the field of human rights. This could happen if Asian governments were to insist on differentiating between indigenous and tribal peoples.

Because of Asian concerns, it might be tempting to accept a limitation in universality by circumscribing the application of the draft declaration to say, the Americas, in exchange for firmer language. But, indigenous peoples would be better served in the long run by a universal declaration, even if it were to be more modest in its scope. This is not to say that the weakening of a declaration of the rights of indigenous peoples in the present could not be offset or balanced in the future by a regional instrument (OAS) or by the progressive strengthening of the declarations as governments become more comfortable with their contents. Lines of communication must be opened with

even the most recalcitrant of countries with the long term objective of gaining their acceptance of a universal convention, the real goal. It would be tragic if this goal were not achieved because countries were alienated by immutable positions over articles of an otherwise non-binding document.

From the perspective of other countries, Canada has a wealth of experience in dealing with and knowledge of the issues that are associated with the provisions of the draft declaration such as lands, culture, languages etc. Canada has also been an active participant in the process for drafting the declaration and has hewed to its traditional position of consistency with principles. Probably more than any other country, it can find the middle way that can enlist the support of the waverers among governments. If issues such as self-determination were to come to the fore early in the process, Canada would have a better chance of negotiating language that would go some way towards meeting indigenous aspirations than most other countries.

For indigenous peoples, the international recognition of a right of self-determination at international law is fundamental. But, member states of the UN are not ready to recognize such a right and some are certainly inclined to exclude such language from the text of even a non-binding declaration. On the other hand, a number of countries, mostly the WEOG, accept the proposition of certain jurists and scholars that language applicable to a right of self-determination of minorities must be devised if a succession of civil conflicts in the midst of multi-ethnic societies such as the former Yugoslavia are to be avoided. Similarly, special language that applies to indigenous peoples needs to be explored. While waiting for such an articulation to be found, it is indispensable for indigenous peoples to preserve at all costs the

terminology of self-determination and its application to them in the draft declaration, even if it has to be qualified for now.

To preserve the term, a compromise needs to be sought, possibly along the lines of one or more Canadian proposals that were put to the WGIP in 1993 and 1994. One such possibility would be to assemble in the first section of the draft declaration, all of the paragraphs which refer to negotiations on self-government and juxtapose them to article 3 on the right of self-determination. This would establish a link between the process of coexistence within a sovereignty and the principle of self-determination. This juxtaposition would lessen some of the ambiguity that persists around article 3 when taken in isolation from the rest. This alternative might have a reasonable chance of acceptance if the declaration were drafted with descriptive language more akin to the enunciation of principles than to the legal terminology of a convention in waiting.

A more promising possibility would be to revive an unofficial proposal Canada circulated among a few at the 11th session of the WGIP in 1993. The Canadian observer delegation suggested for the informal consideration of participants, wording for a formula on self-determination paraphrasing the international covenants:

All peoples have the right of self-determination in accordance with established principles of international law. This right applies to indigenous and non-indigenous jurisdictions, giving indigenous peoples greater levels of autonomy over their own affairs while taking into account the jurisdictions of the surrounding state.<sup>29</sup>

It was proposed that this formulation be included



in the preamble of the draft declaration and that it be complemented with supplementary paragraphs in the operational sections, establishing a process of negotiations between governments and indigenous groups on the particulars of sharing jurisdictions, the headings of power of self-government arrangements and so on. The formulation was not rejected by the several indigenous groups who were consulted nor by certain key states such as Brazil to whom it was shown. Regrettably, the proposal was not discussed in plenary. The chairperson of the WGIP went through the motions of sharing the text with her fellow experts when all along she, and perhaps the others, had already made up their minds to proceed with the wording of what became article 3 even though they knew full well that states would not accept the articulation. Rather than take on the onus of reopening the debate, they preferred to leave it to the eventual consideration of governments.

As already mentioned, a solution to the "peoples" issue will fall into place in and of itself upon resolving the self-determination equation. In anticipation of a solution to the latter, should the term be pluralized? It can be argued that the point is hardly worth making if an unqualified right to self-determination is not recognized. It can be argued also that failing a satisfactory outcome to the self-determination issue in the immediate, acceptance of "peoples" would be an encouraging step towards a future when it is supposed that legal and academic scholars will define a scope of application to self-determination to the satisfaction of governments. It is likely in this event that governments would fall back on the disclaiming language of ILO Convention 169: "The use of the term "peoples" in this convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."<sup>30</sup> The Inter-American Commission on Human Rights does exactly



this in article 1(3) of the definition section of its draft declaration.

## **The Rights of Women**

The inclusion of an article on gender equality in the draft declaration illustrates one way for indigenous representatives to work with governments.

After the intense attention that was given to women's issues at the 1993 World Conference on Human Rights in Vienna, and in anticipation of the World Conference on Social Development and the World Conference on Women's Rights that were to be held in Copenhagen in 1994 and Beijing in 1995, the Canadian delegation was taken aback by the failure of the WGIP to include a provision for the equal applicability of rights to women in their 1993 draft declaration on the rights of indigenous peoples. Consequently, at the 11th session of the WGIP in 1993, the Canadian observer delegation brought the omission to the attention of the experts and proposed wording for an additional article, paraphrasing the wording on gender equality in the Canadian constitution<sup>31</sup>. By the end of the 12th session in 1994, when it was still not clear whether the additional article would be accepted, the delegation lobbied the individual experts of the WGIP for their support. The expert from the Africa region subsequently proposed that the Canadian recommendation be accepted by the WGIP: it was, but only after rewording the article to its present form.

As the principle of gender equality is not accepted universally, a number of indigenous leaders from different geographic regions were consulted about the Canadian proposal and the language. Without

exception, all responded positively even though some demurred (apologetically) from a public endorsement. As a result, resistance among a small number of indigenous representatives (including some from Canada) was desultory and not supported.

For the future, it might be desirable to conceive of a section in the draft declaration that enfold more specific protections. As well, references in other instruments but in ways specific to indigenous women should be proposed to the CHR in an omnibus "catchup" resolution.

### **The Working Group of States of the Commission on Human Rights**

A working group on the draft declaration on indigenous rights<sup>32</sup>, referred to informally as the WGDD, was convened in Geneva during the last two weeks of November 1995. The ambassador of Peru was elected chairman/rapporteur.

The chairperson of the WGIP had proposed that the Chairperson of the WGDD be an indigenous person from a government delegation<sup>33</sup>. It is not clear what advantage would have been gained from a gesture smacking of such tokenism. Without prior agreement from states, the notion was doomed from the beginning. Unfortunately, it put governments in the position of starting proceedings on a negative note over an issue of little consequence. Normally, the chairperson is elected by consensus by member states of the working group from among the delegations present. An indigenous candidate would therefore have had to be a member of a delegation. A delegate is expected to follow instructions from his or her capital and to represent these views faithfully to others. As

any number of governments are known to have major difficulties with the draft declaration, their unease would hardly have been alleviated by a self-interested chairperson.

The proceedings at the Human Rights Conference in Vienna illustrate how crucial it is to have an experienced and respected individual in the chair, particularly one well versed in the subtleties and nuances of multilateral diplomacy. The selection of the right person can be determinant to the outcome. But if this role is important, that of rapporteur is equally so. Whoever holds the pen sets the tone and creative drafting will certainly be called for to conciliate the extreme positions governments will take, at least at first. This is why the combined functions which the chairperson of the WGIP has used to dominate the proceedings and the process of that body need to be separated when the WGDD reconvenes. No long term advantage accrues to either party to the debate if the outcome is not balanced and reflective of the interests of all.

Unlike the WGIP which is composed of experts appointed by the Sub-Commission, the WGDD is composed of state representatives. It is constituted as a committee of the whole i.e. a body to which every member of the constituting authority (CHR) has a right of participation and the right to vote. All 53 elected member states of the CHR belong but all do not participate. As a committee, it reports to the CHR. NGO representatives, certified by the NGO Committee of ECOSOC, can participate in the proceedings in the form of statements but they cannot vote. Indigenous groups will have to accommodate to this reality. Some of the most prickly issues are likely to emerge early in the deliberations when the article by article consideration of the document begins. The very title that the experts of the WGIP have given to the

document "Draft Declaration of the Rights of Indigenous Peoples" can trigger a debate about defining who is indigenous. The same title can also provoke a reaction to the use of "indigenous peoples" in the plural form, a reaction that could lead to a premature debate on self-determination. Even if a debate on the title were avoided, issues such as self-determination can be expected to come forward early in any event, either in the preamble or in the first section of the draft declaration.

By all accounts the first session of the WGDD was businesslike, with distinct efforts being made to accommodate the participation of indigenous representatives in the debate. Predictably, major nations of WEOG such as France and the United Kingdom gave statements at the WGDD that presage an unwillingness to recognize collective rights. Their positions conform to those that they have always taken with respect to the rights of minorities. The United States appears to be giving a highly constructionist interpretation to every article of the draft declaration. The Asian group holds to its positions regarding the definition of who is indigenous and seems for the rest to be biding their time on other issues, content to let others bear the burden of challenging the substance of the draft declaration. At the other extreme, Colombia, Denmark and Fiji appear to give uncritical acceptance of the overall document. Canada and other likeminded states fall somewhere between, reasserting their recognition of some collective rights.

Provision has been made for the certification of more than the eleven indigenous organizations which now have consultative status. As of the time of writing, 95 more organizations have applied for certification and about 75 have been approved: most of these are said to be from the "developed" world. The process follows the meticulous vetting procedures of the NGO

committee in New York. Consultative status for the new entries is only for the draft declaration process.

It is hoped that the certification procedures will not be followed as strictly as is the norm. As matters now stand, governments are to be informed by the Committee of the submissions for consultative status by indigenous groups from their respective countries. There is an implication that a veto can be exercised. The NGO Committee in New York is extremely sensitive to even the appearance of interference in its deliberations. While this sensitivity is laudable for ensuring neutrality and objectivity, it becomes less so if the process becomes a screen behind which governments censor NGOs critical of their policies.

The WGDD will reconvene in November 1996 to continue its consideration of the draft declaration.

### **Government Management of the Draft Declaration in Canada**

The choice of interlocutors on the subject can be crucial both for the ultimate contents of the document and for the representations that will be required to gain support. At the Ministry of Foreign Affairs and International Trade, the South America and Inter-America Relations Division is responsible for managing relations with the OAS in Washington. The Human Rights and Justice Division is responsible for all questions concerning human rights at the United Nations. Officials in the first division seem to spend less time in their functions because of the rotational requirements of the service compared to those who serve with the UN Branch who seem to pursue career patterns that retain them for several tours of duty. As well, the Human Rights division is the main repository

of knowledge and experience with indigenous matters in the ministry. Indigenous interests would be served better if responsibility for the draft declaration were transferred to the Human Rights division. As universal instruments have primacy over regional instruments and as the UN draft declaration is more rounded a document, the OAS draft declaration could not but benefit from a cross-pollination of content and process. A final benefit would be to facilitate and reduce the cost of separate consultations on both instruments by locating these under one roof and in one process.

As a case in point for the Human Rights Division of the Ministry of Foreign Affairs to oversee the consideration of the draft declarations of the UN and the OAS, the principles and standards applicable to the collective rights of indigenous peoples in both documents must be harmonized. The definition question of who is indigenous illustrates why. The draft declaration of the UN provides no definition yet the subject has been debated in the WGIP. Asian governments have served notice of the importance that they attach to this question and will certainly force the issue in the WGDD. On the other hand, the draft declaration of the OAS proffers alternative wording in article 1 that broadens the scope of application in disadvantageous ways to indigenous peoples: "...peoples brought involuntarily to the New World who freed themselves and reestablished the cultures from which they have been torn."<sup>34</sup> Variations of this concept could serve to rationalize other displacements of indigenous peoples, weaken the case for historical or traditional occupancy of indigenous lands and justify the occupation of lands by non-indigenous persons. The proposal, even if debatable, is mischievous in that it could pit Caribbean peoples against indigenous peoples of the Latin American mainland over who qualifies for the protections of the draft declaration. It also could place indigenous peoples of the Americas in the



invidious position of opposing the inclusion of peoples with legitimate concerns of their own. The disinterested sympathy of Caribbean nations towards indigenous peoples could be undermined if conflict over indigenous identity were to be introduced into the process of consideration of the draft declaration.

### **The Elusive Partnership**

Canada is one of the few countries that is attempting in substantial ways to redefine its relations with the indigenous first nations of the country. With the possible exception of Denmark, it has gone farther in establishing public processes for negotiating land settlements, self-government and constitutional issues than any other country. Various judgements of Canadian courts have refined the historical and legal obligations that flow from the treaties and past understandings with indigenous peoples. Because international human rights has been a cornerstone of Canadian foreign policy, Canada has a moral if not a political obligation to extend that policy for the benefit of indigenous peoples through a sharing of its experience with other national governments and their indigenous communities. Much as the French personality of Canada is reflected in its relations with "la Francophonie", the same principle needs to be extended to the indigenous personality of Canada vis-à-vis their counterparts in other countries.

Indigenous representatives from Canada have been leaders in the process of obtaining international recognition of the rights of indigenous peoples. From the confident position they hold in a country where, for the most part, their rights are respected, they have been able to persuade others to demand as much as they. This is only to be expected but the consequences

are that many governments will not cooperate and indigenous peoples face the real risk of seeing much of their work undone. The Aboriginal peoples of Canada might want to conceive of international instruments that for now, do not go much beyond the principles which are current in Canada and which find expression in the protections they have won in the courts and which they have by right of the treaties, claims settlements and the Constitution. While this might be less than that to which they aspire, it still provides for an immeasurable reinforcement of protections for indigenous peoples in many countries.

In the vast majority of countries, few indigenous peoples live with anywhere near the same protections as the Aboriginal peoples of Canada. The question that needs to be put is whether it is better to see to the adoption of legal instruments that can provide at least partial protections to those who have virtually none or for the sake of principle, get out so far in front that all end up with little or nothing except the satisfaction of having adhered to principle.

An agreement on text between the Aboriginal peoples of Canada and the Government could result in constructing a base of rights upon which more could gradually be built. Most importantly, Canada could be enlisted to promote and sponsor the new instruments as an ally of indigenous peoples of the third world, particularly in Central and South America where some leverage can be exercised through future negotiations with countries seeking to join NAFTA. If the Aboriginal peoples of Canada were able to arrive at an agreement with the government, their representatives would have a right to expect that the government use its good offices to persuade other governments to be more receptive to indigenous claims for recognition of rights. There is no reason why the government could not then intensify its support by making

representations bilaterally to governments rather than confine its efforts to lobbying other delegations in the fora of the UN and the OAS.

An example of a confidence building measure is the sponsorship Canada is offering a UN experts seminar on practical experiences regarding indigenous land rights and claims in Whitehorse, in March 1996. By inviting senior officials of governments, responsible for indigenous issues, to attend with indigenous representatives from the same countries, all can share equally in the experience of indigenous and non-indigenous Canadians in the process of land claims settlements. By ensuring the participation of experienced negotiators of aboriginal descent in the canadian process, the mistakes on both sides can be aired so as to be avoided in other milieus, and successes can be replicated. Demonstrable successes can serve to accelerate agreements. Most importantly, it needs to be demonstrated how these arrangements can be beneficial because all parties know then where they stand.

It is reasonable to suppose that the aboriginal leadership of Canada can find an accommodation between the aspirations they have fostered at home and abroad and the concerns of the Government of Canada. Indicative of the possibility is the onofficial agreement on self-determination language that aboriginal representatives and officials found in Ottawa by the end of a frank and freewheeling discussion in April 1994, in the Department of Foreign Affairs:

The indigenous representatives at the meeting, expressed the view that the right of self-determination they propose to be recognized in the Draft Declaration is an existing fundamental principle of international human rights law (i.e. the

Covenants) to which Canada has acceded. They agree that, for the indigenous peoples of Canada, this right is being and/or can be fully exercised and respected within the framework of the Canadian constitution and political process while respecting the universality of rights.<sup>35</sup>

To strengthen their voice, the Aboriginal peoples of Canada need to come together in common cause, perhaps through the founding of a "Secretariat of Indigenous Foreign Affairs", funded by government and with formal links to it. While their legal status in Canada varies, the draft declaration applies to Indians, Inuit and Metis in international fora in the same way. As in the case of multiple secretariats for the Year and for the Decade processes, the Government will certainly balk at funding more than one secretariat for international issues. In fact, the government has not had to address even the issue of common funding because of the disunity among Aboriginal peoples. This is not to say that funding would be forthcoming in the present financial circumstances if a proposal for one secretariat were presented but aboriginal leaders should not provide the government with a convenient reason to deny them funds.

The partnership between the Government and the Aboriginal peoples of Canada can be promoted by the active support of the NGO community, particularly those which profess an interest in the wellbeing of indigenous peoples. The NGO community meets with the Department of Foreign Affairs and International Trade for two days of consultations prior to the annual session of the CHR. A third day has been added to accomodate the special interests of the Aboriginal peoples of Canada. This last consultation is open but very few non-indigenous NGOs attend. NGOs should remain for the third day to add their experience and

specialized knowledge base to the discussions. NGOs have a valuable role to play in bridging the sometimes deep gaps of understanding between indigenous peoples and governments. Aboriginal organizations should provide in return, support to NGOs by participating in their two days of consultations. Many of the latter focus their attentions on country situations, peoples and themes that are particularly relevant to indigenous peoples.

Certainly, the aboriginal consultations in Foreign Affairs have benefitted by the active participation of the heads of the International Centre on Human Rights and Democratic Development and the Human Rights Commission of Canada. Their role ought to be carried into the structured consultations which are envisaged to prepare for consideration of the draft declarations.

## Conclusion

This paper has been written from the perspective of a public servant who, with colleagues representing the gamut of government interests, has been privileged to participate in many of the processes that have altered the relationship between the Aboriginal peoples of Canada and the government. Perforce, the examples of the paper dwell on the Canadian experience. Similar experiences are occurring elsewhere. The reader has but to replace "Canada" with the name of any country to see where there is a fit, where other approaches might be worth exploring or what might be the pitfalls.

It is time for the Government and the Aboriginal representatives of Canada to reflect on the consequences of not working together. Without an internal agreement on rights there is little likelihood of

enlisting the influence which Canada can bring to bear in international fora where the draft declarations will be considered. The possibility is very real that indigenous peoples of the developing world will not obtain the political protections that even a declaration can provide if Canada and likeminded states do not put their backs to the wheel. With an agreement, as stated earlier, the aboriginal leaders would be justified in demanding that the government make its best efforts to persuade other governments, including the most recalcitrant, that it would be to their long term advantage to co-sponsor a generous articulation of rights of indigenous peoples.

International declarations do not by convention require the concurrence of provincial (much less territorial) governments. But, it is certain that for indigenous peoples the draft declaration is but a stepping stone towards a full fledged convention (with all of the legal ramifications of an international convention). An agreement between the federal government and the Aboriginal peoples of Canada is of limited value if provincial and territorial governments are not implicated. This must be a necessary step in driving the process to a satisfactory conclusion. It would be unconscionable to repeat the mistake of the ILO Convention 169 process by agreeing to a text to which the other governments cannot subscribe. It would be more consonant with the spirit of the fiduciary relationship between the government of Canada and the Aboriginal peoples of Canada that provincial and territorial governments be included in the process leading to decisions before international negotiations are seriously started. Should these international agreements be achieved without prior inputs, it will be most difficult if not impossible to undo them if later, provincial governments deny their concurrence.



The NGO community can help reconcile all parties in a process which is infected by suspicion, misunderstanding and rivalry for dominance. They have a bridging role to play even if their intrusion is occasionally resented. The quality and quantity of indigenous participation in the multilateral processes regarding indigenous rights demonstrate clearly that they can make their own case.

The Government has established itself in a traditional role of advancing progress on principles and standards relating to human rights and has a special responsibility for the Aboriginal peoples of Canada. Together, they have a duty to other governments and indigenous peoples to put their experience at the service of others and to combine the best features of their respective skills to bring about an agreement of benefit to all of the indigenous peoples of the world. This can only result by prior agreement in Canada, encompassing compromises from all parties and some considerable degree of altruism on the part of the Aboriginal peoples.

The advocacy of compromise does not mean that indigenous peoples need lower their sights in multilateral fora. The draft declarations articulate principles and should represent the highest aspirations of indigenous peoples. However, the advent of a hybrid declaration/legal instrument does suggest that they look for accommodations with governments which, at the end of the day, are the negotiators and the decision makers in the rights processes.

## Notes

1. Draft Declaration on the Rights of Indigenous Peoples as Agreed by Members of the Working Group on Indigenous Populations at its 11th Session. E/CN.4/Sub.2/1994/2/Add.1
2. Draft of the Inter-American Declaration on the Rights of Indigenous Peoples. OEA/Ser/L.V/II.90, DOC.9 rev.1 September 1995.
3. CHR Resolution 1982/34 of March 10, 1982.
4. ECOSOC Resolution 1982/34 of May 7, 1982.
5. Report of the WGIP on its 13th session. E/CN.4/Sub.2/1995 para 28.
6. International Labour Conference: Convention 169: *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*. Adopted by the Conference at its 76th Session. Geneva, June 27, 1989.
7. Suggested readings:
  - a) "Un premier bilan de la Convention relative aux peuples indigènes et tribaux de l'OIT". Lee Swepston. *Recherches amérindiennes au Québec*, Vol. XXV, n° 3, 1995, p. 47-48.
  - b) International Labour Office: *Partial Revision of the Indigenous and Tribal Populations Convention*, 1957 (no. 107). Report VI (1). International Labour Conference 75th session 1988.
  - c) "A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention 169 of 1989". Lee Swepston. *Oklahoma City University Law Review*. Vol. 15, No. 3, Fall 1990.
  - d) *Indian Law/Race Law*. James E. Falkowski, Praeger Press, New York.
8. The author, less taken with the weight to be given to the contention that "peoples" supports the proposition of a "right of self-determination", uses the plural form of "peoples" except where usage in official documents calls for the singular form.
9. Statement by the Observer Delegation of Canada to the Working Group on Indigenous Populations, Geneva, July 21, 1993.
10. UN General Assembly Resolution 48/163: International Decade of the World's Indigenous People.
11. UN General Assembly: International Year for the World's Indigenous People: A/C.3/46/L.56 November 25, 1991. Note that "for" was amended to "of" in 1992, in deference to indigenous

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observations that the original title was condescending.

12. *World Conference on Human Rights: The Vienna Declaration and Programme of Action*. June 1993. UN Department of Public Information. DPI/1394-39399 August 1993.

13. Report of the Technical Meeting on the International Decade of the World's Indigenous People. E/CN.4/Sub.2/AC.4/1995/5 July 24, 1995.

14. Report on the United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992. UN Publication no. E.93.L8 and corrigenda.

15. CHR resolution E/CN.4/1988/L.62/ rev.1 March 8, 1988. Operative para 1. Study on the Significance of Treaties, Agreements and Other Constructive Arrangements for the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous Populations.

16. *A New Partnership*. Report of Justice A.C. Hamilton. June 11, 1995. Term of Reference, p. 1, Introduction, p. 3.

17. *Ibidem*. Introduction, p. 3.

18. For the perspective of the Special Rapporteur, see Isabelle Schulte-Tenckhoff: "L'Étude des Nations Unies sur les traités entre peuples autochtones et États". *Recherches amérindiennes au Québec*. Vol. XXIV, n° 4, 1994, p. 7-27.

19. Report on the Protection of the Heritage of Indigenous Peoples. E/CN.4/Sub.2/1995/26.

20. Renée Dupuis: "Des écarts importants entre la Convention 169 de l'O.I.T. et le droit canadien". *Recherches amérindiennes au Québec*. Vol. XXIV, n° 4, 1994, p. 29-36.

21. Report of the Workshop held in accordance with CHR resolution 1995/30 on Consideration of a Permanent Forum for Indigenous People in the United Nations. E/CN.4/Sub.2/AC.4/1995/7.

22. Report of the WGIP on its 13th session. E/CN.4/Sub.2/1995/24 paras. 150 and 151.

23. *Ibidem*. para. 175.

24. Report of the UN Commission on Human Rights - Session L1: CHR Resolution E/CN.4/1995/L.11/Add.2: 1995/31 Operative para. 5. Report of the Working Group on Indigenous Populations of the Sub-Commission.

25. *Ibidem*. Operative para. 7.

26. Report of the WGIP on its 13th session. E/CN.4/Sub.2/1995/24

para. 175.

27. *Ibidem*. Section II

28. Report of the UN Commission on Human Rights - Session L1: CHR resolution E/CN.4/1995/L.11/Add.2: 1995/32. Operative Para 2. Establishment of a Working Group on Human Rights to Elaborate a Draft Declaration in Accordance with Operative Paragraph 5 of General Assembly Resolution 49/214 December 23, 1994.

29. Diary notes, July 1993.

30. Lee Sweptson: "A New Step in the International Law on Indigenous and Tribal Peoples". *Oklahoma City University Law Review*. Vol. 15, p. 163.

31. Diary notes July 26, 1993.

32. Report of the UN Commission on Human Rights - Session L1: CHR Resolution E/CN.4/1995/L.11/Add.2:1995/32. Establishment of a Working Group on Human Rights to Elaborate a Draft Declaration in Accordance with Operative Paragraph 5 of General Assembly Resolution 49/214 December 23, 1994.

33. Report of the Working Group on Indigenous Populations on its 13th session. E/CN.4/Sub.2/Ac.4/1995/5 para. 20.

34. Draft of the Inter-American Declaration on the Rights of Indigenous Peoples. OEA/Ser/L.V/II.90 Doc.9 rev.1. September 21, 1995.

35. Diary notes, April 21, 1994.

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**Mrs. Carmen Yambeola Morán,  
FICI representative. Geneva  
1994.  
[Photo Beatrice Weyrich]**

# The Legal Value of Self-Determination: Vision or Inconvenience? <sup>1</sup>

*Maivân Clech Lâm*

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*For Charlene Sato,*

*A cherished friend, a committed partisan of the downtrodden, and a respected academic who writes prolifically on pidgin and creole languages so that the world may know and honour them, as it does other languages, as the rich and powerful expressions of the thoughts and feelings of unique human communities.*

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Maivân Clech Lâm is Associate Professor, City University of New York School of Law.



Empire has located its existence not in the smooth recurrent spinning time of the cycle of the seasons but in the jagged time of rise and fall, of beginning and end, of catastrophe. Empire dooms itself to live in history and plot against history. One thought alone preoccupies the submerged mind of Empire: how not to end, how not to die, how to prolong its era.

(J.M. Coetzee)<sup>2</sup>

Philip Allott, writing recently on self-determination, asked whether the latter was an absolute right or, instead, social poetry?<sup>3</sup> I ask a related question: is the concept of self-determination in international law still a useful vision or has it become a troubling inconvenience? While many answers could be offered to these questions, I propose that one answer, which some now directly or indirectly advance, is not acceptable: and that is that self-determination — understood as including the right to political independence — is a right reserved to those already privileged to exercise it, but an inconvenience not to be tolerated in the case of those who, not currently so privileged, would assert it<sup>4</sup>.

The answer is unacceptable because the double standard that it constructs, were it to prevail, would do two things. First, as with all double standards, it would drain the concept of self-determination of any legitimacy that it presently carries, for any party, in any context. Second, the double standard would wrench the discourse of self-determination away from its present locus in the domain of law and rights and consign it to the realm of politics and might. An unfortunate result for, as we know, law can function as an ameliorative mechanism to mitigate the

characteristic brutality, rawness and, in some cases, abruptness of the exercise of power in human affairs. And we have seen much of that of late, especially in relation to ethnic-framed conflicts, which should lead us to search for more, rather than less, mitigation. This mitigation, I suggest, calls for an interpretation of the concept of self-determination that accepts that it functions, at various times, as all of these things : right, poetry, vision and inconvenience.

Specifically, I shall propose two things : 1) that the right of self-determination be consistently *conceptualized* in its broadest terms, both as to content (the "what" issue) and beneficiary (the "who" issue); 2) but that, at the same time, criteria, institutions, and processes be developed in the international community to effectively canalize self-determination energy, whenever it arises, along a peaceful and graduated path to its desired political expression which, in turn, may well evolve in the course of such a regulated journey. I shall try to establish the above points in the three-part discussion that follows. Part I analytically reviews the development of the theory and practice of self-determination at the United Nations (UN) up to about 1980. Part II extends this review to developments since 1980. Part III advocates a further development.

## **Pre-1980 Developments**

### **Theory**

The developing substance of the concept of self-determination cannot be understood without fully appreciating its paradigmatic moment, which ran roughly from 1945 to 1980, during which time almost

all of Africa, Asia, and Oceania — empowered by the principle and later the right of self-determination — shook off their colonial status to accede to full political independence. Their actions profoundly impacted a complex of concepts central to international law. These are: sovereignty, self-determination, peoples, states, secession, and autonomy. Looked at together, these concepts allow us to arrive at a plausible interpretation of the meaning of self-determination that can be useful for our time.

Although *sovereignty* is a term of established standing in international law, the latter, interestingly, has never formally defined it. The term's long and unfettered use has consequently spawned enough divergent interpretations that some question its utility altogether<sup>5</sup>. Alternately, the term is found to be too mechanistically equated with statehood and independence. A more nuanced linkage of the term to these last two concepts, it has been urged, would describe sovereignty as the latent capacity for, rather than the actual realization of, independence and statehood. Others urge that the many semantic foci that have coalesced around the term be simply acknowledged. These are: 1) a state's supreme and exclusive competence to act within its territory; 2) a state's competence to act within its territory to the extent permitted by international law; 3) maximal international legal personality<sup>6</sup>.

Synthesizing in part from the above, I suggest that sovereignty be understood as variably expressing two distinctive if interconnected ideas: a) the inherent right of a people, *and by extension of the state that it creates*, to recognize no secular authority other than itself in its own territory; b) the actual translation of that right into a practice of maximal political authority. A sovereign may thus remain sovereign yet choose to exercise less than its full complement of

power. Indeed, this is what happens regularly in the international arena today as states consent to yield, or conform, some of their activities to international organizations or standards respectively. Domestically, states may also choose to limit the exercise of their sovereignty by devolving some of it onto lesser constituent units such as provinces and autonomous zones.

Whatever its configuration, the exercise of sovereignty is characteristically territorial. That is, a sovereign state is dominantly potent on one side of a line and abjectly impotent on the other. The world, in turn, is fully divided up by such lines and the states that they enclose. Because the heady days of the French and American Revolutions are behind us, it has become easy to forget that, according to the liberal political theory on which the construction of modern states is founded, there remains on every territory an authority higher than the state, and that is the people or peoples of that state. This forgetfulness has led, more often than not, to a conflation of the concepts of sovereignty and state, as in the familiar phrase "the sovereignty and territorial integrity of states".

All the same, few contemporary theorists, or states for that matter, however non-revolutionary, would repudiate outright the theoretical premise asserted by the French and American Revolutions that the state detains nothing that does not come to it first from the people. Granted that not many would now be moved, like that 19th century enthusiast of the nation-state, Ernest Renan, to cast the state's existence as the "daily plebiscite" of the people<sup>7</sup>. Still, the core of Renan's vision remains the justification, if not any longer the uncomplicated origin story, of the democratic state. And that justification hypothesises, at a minimum, a continuing will out there in society that somehow moves legitimacy from its fundamental

source — the people, to a contingent outlet — the state.

*Self-determination* is about that unambiguous fundamental source<sup>8</sup>. By contrast, until the French Revolution unequivocally pinned it on "the people", the locus of sovereignty in Europe had remained, to a degree, contentious<sup>9</sup>. European kings and other rulers, for one, regularly arrogated its attribute to themselves. To this day, the use of the term to describe the successors of kings and rulers — as in "sovereign governments and states" — is taken as "normal", or at least does not jar, though perhaps it should. The "self-determination of states", however, strikes the ear as decidedly less normal.

And for good cause. Because the state, under liberal democratic theory, cannot strictly speaking act for itself, but must always perform as the agent of another — i.e. the people — it cannot simultaneously claim to be literally "self-determining" and legitimate. A. Rigo Sureda isolates an important consequence of this 18th century shift of the source of legitimacy from ruler to ruled:

The history of self-determination is bound up with the history of the doctrine of popular sovereignty proclaimed by the French Revolution: government should be based on the will of the people, not on that of the monarch, and people not content with the government of the country to which they belong *should be able to secede and organize themselves as they wish. This means that the territorial element in a political unit lost its feudal predominance in favour of the personal element: people were not to be any more a mere appurtenance of the land.* (emphasis added)<sup>10</sup>

Note the strikingly similar conclusion reached by

Judge Dillard in *The Western Sahara* case: "It is for the people to determine the destiny of the territory and not the territory the destiny of the people." <sup>11</sup>

The word "self-determination" figured at the very founding of the UN <sup>12</sup>. Article 1 of the 1945 Charter lists, among the purposes of the organization, the building of international relations based on respect for the principle of the self-determination of peoples. The elevation of this principle into a right came, in 1960, in General Assembly resolution 1514 (XV), also known as the *Declaration on the Granting of Independence to Colonial Countries and Peoples*:

All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The above passage reappears, *verbatim*, in 1966 as Articles 1 of both the *International Covenant on Economic, Social, and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

Note that the concept of self-determination, unlike that of sovereignty, denotes no particular political status, nor even a preference for one. It simply declares the broad right of a people to make its own decisions, beginning with the all important decision of choosing a particular political status. Resolution 1541 (XV), headed *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73e of the Charter of the United Nations*, passed by the General Assembly one day after Resolution 1514, explicitly states that the status chosen may legitimately range from independence, through free association with an existing state, to incorporation in it. Free association, the Resolution further adds, is reversible.

As it turned out, practically every colony in Asia, Africa and Oceania that availed itself of the right of self-determination after World War II (WW II) opted for political independence. In the scheme of things, this brought them full international recognition, including a UN seat, and exclusive domestic jurisdiction. A handful of colonies, located mainly in the Pacific, chose incorporation (American Samoa and Guam), or free association (Cook Islands, Marshall Islands, Belau, and the Federated States of Micronesia).

Because I believe that the status of free association holds particular relevance for our time, I note briefly here the highlights of one such association: between the Federated States of Micronesia (FSM) and the United States (U.S.)<sup>13</sup>. The political entity now known as FSM was, at the start of WW II, a segment of the far-flung chain of Micronesian islands that Japan administered under a League of Nations Mandate. After the war, the UN converted the Mandate into a Strategic Area Trust which it handed to the U.S. to administer in accordance with Chapter XII of the Charter. The U.S., in 1969, entered into negotiations with representatives of the Micronesian peoples for the purpose of fashioning a special bilateral relationship between them that would survive the termination of the Trust. These talks culminated, in the '80s, in a series of agreements between the U.S. and separate parts of Micronesia.

The formula that FSM and the U.S. agreed to is called the Compact of Free Association, which formalized three notable agreements: that the Compact was concluded by sovereigns; that its terms bind for a finite period (25 years); that additional periods and terms may be re-negotiated. Existing terms vest full authority for both domestic and foreign affairs in the FSM government, except in matters of defense or security, which the U.S. wholly pre-empts.



What holds interest in this arrangement is that a means was found for the concerned parties to gradually discover and thereafter enact a bilateral relationship that is comfortable to both, and that both may change, even as both continued to independently pursue their other relationships<sup>14</sup>. No *cri de passion* was raised here in the course of FSM's assertion of self-determination, and no lives were extinguished for some eternal stake since no eternity was staked.

While self-determination, then, need not be about choosing the elusive eternal, the right to choose that it enshrines has, for its part, achieved something of a sacrosanct if not eternal status in international law. Indeed, in the view of Héctor Gros Espiell, the right of self-determination, given the notable role that it has played in ordering this century's political architecture, has achieved *jus cogens* status<sup>15</sup>. That is, self-determination is now a peremptory norm of general international law from which there can be no derogation. Such peremptory norms, Article 53 of the *Vienna Convention on the Law of Treaties* states, "can be modified only by a subsequent norm of general international law having the same character"<sup>16</sup>. Few scholars would claim that the territorial integrity of states constitutes such a norm. Indeed, Cassese points out that the UN has not even permitted the value of peace, which ultimately outranks that of territorial integrity in the UN system, to overcome the pre-eminent status of the principle of self-determination. As he puts it, "self-determination has become an independent and absolute value. The action of the Organization has — most laudably — overtaken the principles on which it is founded"<sup>17</sup>.

As noted earlier, General Assembly Resolution 1514 (XV) and the two International Human Rights Covenants contain a brief but broad definition of the right of self-determination. In contrast, no such formal

definition exists for the concept of *peoples*. Early interpretations of the right of self-determination thus collided over the issue of *who* detained the right, and not *what* constituted it. Politically, the answer to the first question tended to be: those who look like us have the right. Western powers were prone to favour peoples who, like them, displayed a history of statehood (Christianity also helps)<sup>18</sup>. This explains the facility with which the West recently recognized the re-establishment of the Baltic states, which perfectly fit this paradigm. Third World countries after WW II, on the other hand, championed the self-determination right of peoples who, like them, suffered colonial, alien, or racist oppression, whether or not such peoples also demonstrated statehood in their political ancestry.

As for the party *against* whom self-determination may be asserted, Resolution 1514 states only that:

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

Clearly, much hinges on the meaning of "alien". Resolution 1514, however, again offers no particular guide to its intended meaning. Rounding out this indeterminacy, Resolution 1514 then recites that the "partial or total disruption of the national and the territorial integrity of a country" is incompatible with the Charter of the UN and, at the end, reaffirms the principle of "non-intervention in the internal affairs of all States". Some have argued, on the basis of these last two phrases, that the right of peoples to self-determination was, from the start, strictly circumscribed by the right of states to their territorial integrity.

I propose that such a reading is hardly evident. First, to state what is evident, a resolution calling itself the *Declaration on the Granting of Independence to Colonial Countries and Peoples* would hardly function as the instrument to definitively privilege territorial integrity over self-determination. At the least, Resolution 1514 had to contemplate that, under its mandate, *several* entities would disrupt the territories of *several* states. The Resolution can, however, properly concern itself with the questions: which entities, and which states? A number of scholars believe that the phrase "non-intervention in the internal affairs of all States" offers an answer to the first question since it identifies who may *not* do the disrupting: those for whom the activity would constitute an action beyond their legitimate interests — i.e., third parties. Indeed, these scholars continue, and I agree, third parties represent the only *linguistically* possible target of the Resolution's injunction against interference in another's internal affairs<sup>19</sup>. By implication, those for whom the matter at hand is their own internal affair may do all the disrupting of territory that they want, provided of course that their activities do not escalate to the point of arousing the usual UN concerns over threats to world peace and human rights.

Resolution 1541, customarily read in tandem with Resolution 1514, for its part positively identifies the parties whose territories may be legitimately disrupted. These are the "colonial countries", which Resolution 1541 describes as states that enclose geographically discontinuous and ethnically distinctive non-self-governing territories. It is this last phraseology, contained in a resolution that was not itself a formal Declaration, that has been used to support the so-called "blue-water" thesis of decolonization which, in this period, gained ascendancy at the UN. The thesis holds that only those peoples

who are separated by a sea from their subjugators — i.e. the distance from the Third World to Europe — are entitled to be decolonized and assert their self-determination. Rodolfo Stavenhagen notes that several commentators, taking into account the entire corpus of UN instruments that bear on the right of self-determination through the 1960s, conclude just the opposite. That, since the paragraph on self-determination contained in Resolution 1514 was later reproduced in 1966 — without any attending language on the territorial integrity of states — in the two International Covenants on Human Rights, the right of self-determination now “applies to all peoples, regardless of whether they live in colonies or not”<sup>20</sup>.

The contest simmering over the meaning of “peoples” in the ‘60s was prolonged, rather than resolved, by the General Assembly in 1970 when it adopted the *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States* (Resolution 2625 [XXV]). The latter re-commits states to upholding the right to self-determination, but also adds:

[N]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a Government representing the whole people belonging to the territory without distinction as to race, creed, or colour. (emphasis added)

As with Resolution 1514, the concept of the territorial integrity of states is again set up as a check against the concept of self-determination. However, if

anything, Resolution 2625 loosens the grip of the territorial integrity of states by tying it to a brand-new limitation. States wishing to preserve their territorial integrity, the Resolution recites, must show that they are in compliance with the principle of self-determination. Furthermore, it is crucial to recall, Resolution 2625, an instrument concluded exclusively between states, only enjoins *states* from breaching one another's territorial integrity and political unity. Their constituents, as has been argued, logically remain free to revise their relationships with them.

The term "state", unlike the term "peoples", has enjoyed a settled meaning since at least the 1933 *Montevideo Convention*, which declared <sup>21</sup>:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States. <sup>22</sup>

Highlighted in this definition, it is clear, are notions of permanency, certainty, and power.

The state, as defined by the *Montevideo Convention*, was the only kind of actor on the world scene that the UN, itself a club of such actors, considered fully legitimate and competent to act internationally at the end of WW II. The attributes of permanency and power required to qualify as club members automatically confirmed an international role and voice at the UN for virtually all European states, either because they were long established, or demonstrably in control of their territories and populations, or, in the final analysis, because the Montevideo criteria had, in the first place, been modelled on their paradigmatic profiles. The settler states of the Americas also fulfilled the criteria for admission to the UN by demonstrating control, going back some 100 to 200 years, over

appropriated territories, vanquished peoples, and settler populations. The incipient modern states of Asia and Africa, having banded their often ethnically diverse peoples together in nationalist movements to expel an overseas enemy, displayed imminent control, and were gradually also admitted to the club. All the above groups thus demonstrated, or could soon demonstrate after 1945, indicia of statehood, or what I call a *power* route to self-determination. Many ethnic groups today, including most indigenous peoples, by contrast exhibit few such indicia and pursue, as they must, a *need* route to self-determination.

As noted earlier, Resolution 1541 clarified the meaning of the right of self-determination recognized in Resolution 1514 by explicitly stating that the right included the right to independence — that is, political and territorial separation or *secession* from an existing state. At the same time, the two texts jointly make clear that a people may exercise its self-determination to effect a political status other than independence. The right of self-determination, then, is comprehensive, but the people who detain it may choose to limit the scope of its exercise. Note that this is entirely different from saying that a second party — be it another people, state, or even the UN — may reduce the right. Now of course lawyers know that any right exists in tension with other rights. The international community, like any other, must thus engage in the never-ending task of creatively weighing and reconciling their competing scopes. This necessary and valid task, however, must not be reduced to the invalid one of constructing, in the area of self-determination, different species of the right that are then meted out to different peoples under an *a priori* discriminatory formula of “different strokes for different folks”.

The temptation to do so has arisen in relation to the indigenous peoples' vigorous assertion of their

right of self-determination at the United Nations in the last 15 years. This, even though indigenous groups overwhelmingly represent that they do not anticipate using the right to establish new states. It is true that, for all that, indigenous peoples have not agreed to a special formula of "indigenous" self-determination that would specifically deny them one of its substantive components: the potential to separate or secede. The reason, as a most prescient but unfortunately anonymous commentator on the subject put it, may be that:

[S]ecession is not a simple act of fragmentation. It is, rather, a complex, continuing process of regrouping personal allegiances, redefining boundaries and control over resources, and restructuring the participatory mechanisms within and among states. Knowledge that the option of separation exists can provide a group with the sense of equality and potential power needed to persevere in an existing state; for those truly oppressed, the right will provide the only means of effectuating self-determination.<sup>23</sup>

Many indigenous representatives, incidentally, stress that the term "secession" does not in any event apply to them. They reason that since their territories were invaded and incorporated into states without their consent, their "self-determination does not constitute secession, but merely the exercise of inherent sovereign powers that have never been relinquished"<sup>24</sup>. Whether called secession or something else, the right to separate from an existing state is clearly encompassed in the right to self-determination. Knowing this, many states, and a number of scholars with them, have become decidedly nervous about the indigenous claim to the right, and now advance the proposition that, even if such a claim were recognized, it could not include the right to separate or secede<sup>25</sup>. Concerned, in other words, that they may no longer be



able to restrict the "who" of self-determination, these parties now agitate to restrict its "what".

They propose that, in lieu of the right to secession, indigenous peoples be entitled to autonomy — also known as self-rule or self-government — which, incidentally, is not a right as such under international law, but rather a domestic status accommodated by some states <sup>26</sup>. The term autonomy typically describes a set of governmental activities that a sovereign state allows a non-sovereign constituent entity to undertake in pursuit of its own welfare. It is, in other words, "an extensive grant of liberty" to a subgroup within a state <sup>27</sup>. The liberty typically covers such things as the running of the sub-group's own schools, the election of its own officers, and the certification of its own members.

Unlike self-determination, then, *autonomy* denotes a specific political status or activity rather than the theory or principle — such as free choice — which generates it. Books and articles are written on "models" of autonomy, for example, but not on the legal theory or principle of autonomy <sup>28</sup>. The opposite is true of self-determination, the theoretical elaboration of which keeps many an academic alive <sup>29</sup>. Conversely, a book on "models" of self-determination, like "models" of free will, would sound incongruous, precisely because one is talking here of an open-ended faculty or competence, and not of finite forms. Thus, even when the activities that a sub-state entity undertakes under the rubric of autonomy are identical in form to, or even vaster in scope than, those engaged in by a sovereign that has agreed to curtail its activities, the theories under which the two proceed remain fundamentally divergent. The sovereign acts on its own authority, the non-sovereign acts in the lee that is countenanced by another. A sovereign augments or compresses its activities at will, within limits established only by

international law, while the non-sovereign must obtain approval for any significant change in its mandate from another. The one operates by right, the other by grant. The one cup may be half full and the other half empty, but two wholly different futures nevertheless potentially await them <sup>30</sup>.

### Practice

It is important to recall that the General Assembly in this period was not debating the subject of self-determination in some theoretical rose garden but was concretely confronted by historical crises that, unfortunately for the legacy that they bequeathed, enmeshed the question of self-determination with that of the former colonial powers' attempts to use local political conflicts to derail the decolonization process. The Katanga and West Papua situations come quickly to mind.

When the Netherlands signed the 1949 Transfer of Sovereignty which acknowledged Indonesia's independence, it left the determination of the fate of West Papua to further negotiations <sup>31</sup>.

In the meantime, a Dutch administration remained in West Papua to, as the Dutch put it, "create conditions for the self-determination of a population" <sup>32</sup>. Indonesians, for their part, saw the continuing Dutch presence there as the prolongation of colonialism in a part of the territory of the former Netherlands East Indies. Amsterdam's sympathy for the local West Papuan separatist movement represented, for many Indonesians, nothing more than a desperate Dutch gambit to leave in place a regime committed to itself and hostile to Djakarta. Thus, when the Dutch asked the UN in 1961 to apply Resolution 1514 on decolonization to West Papua, the Indonesian

government responded that the request was "not used to complete the independence of Indonesia, not in order to solve the Dutch-Indonesia dispute, but in reverse direction, this resolution was used as an instrument to execute a partition of a part of the Republic's territory, a part of the Indonesian nation" <sup>33</sup>.

Most West Papuan leaders of course entertained a goal that was dictated neither by Djakarta nor Amsterdam but was self-directed towards gaining an international status from which they could explore and secure desirable relationships with one or more existing states <sup>34</sup>. Unfortunately, however, the UN, though it was deciding their very fate, never sought as a body to hear formally and directly from the West Papuans. The interpretation of the right of self-determination of peoples thus remained the sole prerogative of states, not peoples!

The Djakarta-Amsterdam impasse broke in 1962 when the Netherlands, reconciled to losing its influence in the area, signed an agreement with Indonesia under which the latter took over the administration of West Papua and, supervised by the UN, conducted a plebiscite to determine the will of its inhabitants. Although the record is very clear that the 1969 vote for union with Djakarta, which the latter took seven years to prepare to its satisfaction, was wholly rigged and shamelessly coerced, the UN merely noted that irregularities had occurred and went on to validate Indonesia's extension of its sovereignty over West Papua. Now, three decades later, with violence at home and silence abroad helping, Djakarta is well on its way to eliminating West Papuans from their own homelands and to replacing them with settlers from Java and other surpopulated Indonesian islands.

The Congo faced the prospect of its territorial dismemberment soon after gaining independence from

Belgium on June 30, 1960<sup>35</sup>. Eleven days later, under the leadership of Moïse Tshombé, the copper-rich southeastern part of the country, Katanga, declared its own independence from the newly formed state<sup>36</sup>. Much more so than in West Papua, "the external factor was of paramount importance, far greater than in most other secessionist movements imbued with a degree of ingroup legitimization. It is clear that without the colonat [white settler], the Union Minière and Belgium, secession would not have taken place, at least not at that time"<sup>37</sup>.

Support for this conclusion is ample. For as long as Patrice Lumumba, the socialist head of state of the Congo at independence, presided in Leopoldville, the West found some fault or other in the central government's administration of its provinces. As soon as he was killed by secessionists friendly to the West, however, the latter, beginning with the Kennedy administration, became born-again enthusiasts of centralized government. The Western mining cartel, which in the early years fueled in more ways than one Tshombé's secessionist drive, likewise quickly demonstrated that it cared far less about abstract political issues like union, confederation, or secession than about extracting the most favourable financial bottom line possible for its business. The cartel rallied to the support of Tshombé, the erstwhile secessionist, as soon as the latter acceded to the presidency of the central government, which he led from July 1964 to October 1965, during which time his native Katanga was placed under far firmer central control than Lumumba ever imposed. In any event, the colonial borders of the Congo were secured, the profits of l'Union Minière safeguarded, and ethnic politics put to sleep, as once aroused, by foreign capital.

Looking back, it is clear that the UN practice regarding self-determination which emerged during

this period was dictated by the political conflict then pitting the West against the Soviet/Third World bloc. This conflict attended the very founding of the UN. Chapter XI of the UN Charter refers to the colonies controlled by the West at the end of WW II as "non-self-governing territories". The Soviet Union had wanted the Charter to specify that the peoples in those territories were entitled to self-determination. Western powers countered with the proposal that they only be offered "self-government within the sovereignty of member states" <sup>38</sup>. In the end, Chapter XI essentially ducked the controversy. It simply holds out the prospect of self-government to dependent peoples, without specifying either its maximal or minimal limits. Later, as calls for self-determination (targeting full independence) for and from Third World countries mounted in the General Assembly, the West, speaking principally through Belgium, devised a stratagem to cut their momentum. Self-determination, the West argued, must be made universally available to all subjugated peoples, whether in colonial or metropolitan countries, including newly independent states.

The "Belgian thesis", advanced repeatedly during the 50s and through the Congo crisis, was flatly rejected by the Third World/Socialist camp which considered it a transparent attempt on the part of the West to destabilize both the Soviet Union and the new multi-ethnic states emerging in the former colonies. Rigo Sureda holds that the rejection of the Belgian thesis was justified for Article 74 of the Charter clearly differentiates between "territories" and "metropolitan areas" <sup>39</sup>. Rigo Sureda notwithstanding, neither Article 74 nor any other part of the Charter goes on to hold that the peoples in these two places consequently enjoy different rights in relation to self-determination.

Given the colonial powers' cynical maneuvers to

cling to the benefits of empire at the end of WW II, the Third World/Socialist bloc may have had no choice but to react as it did to the Belgian thesis. *Theoretically* speaking, however, as W. Ofuathey-Kodjoe correctly notes, as between the Belgian thesis and that advanced by the Third World/Socialist bloc, the former, ironically, represents the more principled approach. Recognizing that the focus of the right to self-determination will shift from one historical moment to another, Ofuathey-Kodjoe nevertheless holds that "the pure meaning of the right" takes in colonial territories as well as other subjugated groups<sup>40</sup>. He continues:

Whether a group in question is territorially based, separate from the state, or dispersed within it, *the subjugation of a group based on its distinctiveness* seems to be the condition that must qualify for a remedy.... A possible solution to this problem is the progressive development of the principle [of self-determination] along lines emphasizing autonomy or association on the basis of equality and de-emphasizing independence.<sup>41</sup> (Emphasis added)

Note that Ofuathey-Kodjoe advocates the de-emphasis, and *not the denial*, of independence.

The majority of states that opposed the Belgian thesis at the UN advanced their own "blue-water" thesis, which has been described. This was used to bar peoples in West Papua, Katanga, Biafra, and Tibet from asserting their self-determination. In several other instances, however, the UN has gone outside the "blue-water" test: Ruanda-Urundi became Rwanda and Burundi; the British Cameroons were split into North and South for purposes of referendum after which the first joined Nigeria and the second became the State of Cameroon; the single colony of the Gilbert and Ellice islands became Kiribati and Tuvalu respectively; and the single Trust Territory of the Pacific emerged from



that status in five different pieces. Additionally, India was permitted to "add on" Goa, Hyderabad, Sikkim, and Kashmir though these did not literally fall within the boundaries of the colonial entity to which India supposedly succeeded <sup>42</sup>.

Unlike the above cases — where either lack of contest, or the decisive power of one contestant over another, rendered doctrine irrelevant or impotent —



*Left, Mr. Ancan Huilcaman, Consejo de Todas las Tierras, Mapuche, Chile, and Mr. Jorge Nahuel, Argentina. Geneva 1995. [Photo Beatrice Weyrich]*

the UN explained its support for the assertion of self-determination by the native peoples of Rhodesia/Zimbabwe, Namibia, South Africa, and Palestine against an adjacent or surrounding state, as opposed to an overseas one, on the grounds that racist (white South African) and alien (Israeli) subjugations rank on a par with the colonial subjugation that is prohibited under the "blue

water" thesis, and hence merit the same remedy. But, even as extended, the thesis fails to reach the case of Bangladesh. The UN's ready acceptance of the emergence of that new state in 1972 thus represents a truly conclusive departure from its "blue water" practice <sup>43</sup>.

How did this happen? For one thing, no UN member-state sustained a significant protest against the recognition of Bangladesh. For another, a country with great power and influence in the region, India, supported, indeed eventually midwifed, this new state. But, finally, and this in my view is crucial, the conflict which led to the break-up of the original Pakistan was one which did not involve third party provocation, or



even involvement, except for the final 13 days. The assertion of self-determination by one party against another there thus remained relatively clean, unencumbered by third-party distortions, and thus of no threat to the world community.

## **Post-1980 Developments**

### **International practice and theory**

The same indicia of non-contest, non-interference, and a demonstrable commitment to separate identity and destiny, in addition to a history of separate statehood, characterize and explain the recent swift and easy separation of the Baltic states from the U.S.S.R., and of Slovakia from the Czech Republic. Finally, and in a uniquely tragic manner, the former Yugoslavia figures in this catalogue of the dissolution of states that the UN has countenanced. Cumulatively then, these several cases, all "extra-colonial", clearly show that, notwithstanding an earlier view that the right of secession ended upon the liberation of all "blue-water" colonies, the practice of states in fact demonstrates otherwise <sup>44</sup>.

Indeed, if now Quebec — whose ethnic "depth" (as Quebecois, not French) is chronologically shallower than that of most other cultural groups now seeking self-determination — also receives a hushed response from both Canada and the inter-state system to its secessionist demand, what then remains of the supposed prohibition against secession in non-colonial contexts other than an *ad hoc*, i.e. arbitrary and discriminatory, preference for some would-be secessionists over others? Indigenous representatives from Canada attending sessions of the United Nations

Working Group on Indigenous Peoples (UNWGIP) from the early '80s on repeatedly raised this point when they passionately argued that a self-respecting international law cannot recognize as lofty a right as self-determination in a discriminatory manner: yes for white settlers in Quebec, no for indigenous peoples throughout Canada<sup>45</sup>.

The indigenous representatives' principled insistence on the universality of the right of self-determination at the UNWGIP finally bore fruit in the summer of 1993 when the five experts composing it unanimously worded the Draft Declaration of the Rights of Indigenous Peoples to read:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>46</sup>

While it is true that the above is not yet law because it appears but in a draft (and a draft of a Declaration rather than a Convention at that), the paragraph nevertheless records the final opinion of a body of respected jurists who presided, for more than a decade, over a highly intense international debate on the subject of the self-determination of indigenous peoples in which more than 200 parties — indigenous, state, and NGO (non governmental organization) — annually participated. As such, the paragraph captures the emerging international (as opposed to merely inter-state) consensus on the subject of indigenous self-determination.

Not only has the practice of states and UN agencies in the last two decades veered away from the "blue-water thesis", the International Court of Justice (I.C.J.) itself broadly characterized the "who" of the right of self-determination in its famous 1975 *Western Sahara* decision. The issue there was not

whether the people of the Western Sahara could assert self-determination, as a colonized people, against Spain, but whether it could assert it as against the neighbouring entities of Morocco and Mauritania, each of which claimed a pre-colonial sovereignty over at least a part of the territory that the people of the Western Sahara used. Displaying admirable anthropological awareness of, and legal attention to, the specific cultural features of North African nomadic societies, the I.C.J. in the case held that a people — defined by their sense of collective identity, mode of political self-regulation, and predictable territory of economic activity — can, absent traditional indices of formal government, stable population, and demarcated territory, claim sovereignty and assert self-determination<sup>47</sup>.

The decision notes that international law does not require that a people exhibit a particular form of governance to qualify for self-determination. It merely requires that the people concerned exhibit a recognizable collective political identity. The test of that identity — which must be demonstrated by a people if it is to successfully claim the right to self-determination — is whether the group enjoys rights vis-à-vis its members, i.e. can require duties of them. The people of the Western Sahara meet it, the Court found, and are thus entitled to self-determination, notwithstanding the considerable evidence submitted to the Court that showed that they historically also maintained regular ties of political allegiance to Morocco and Mauritania.

That the UN has discarded its "blue-water" thesis on a number of occasions involving a variety of fact patterns is all to its credit. To have done otherwise would have been to immobilize a fundamental principle of UN law with the lilliputian strings of a petty geographical test — blue water, a result *reductio*

*ad absurdum* <sup>48</sup>. There are many peoples in the world today who see themselves as oppressed by settlers (persons who have severed ties with their country of origin) rather than colonizers (persons who have not severed such ties), or by states that have mechanically succeeded to the arbitrarily demarcated colonial units that preceded them, or simply by adjacent peoples whom they rightly or wrongly believe disadvantage them. These peoples do not see that their subjugation is any less onerous for being committed by new or old neighbours, or successors to the original subjugators. Consequently, they invoke the same right to redress their situation as was made available to peoples governed out of overseas capitals. That right is self-determination, which they may or may not use to effect total separation from existing states. Either way, there simply exists no principled basis for telling them that the time for legal secession has passed.

#### The conceptual debate

That the "blue-water thesis" no longer holds water is clear. What perspective should replace it, however, has become a subject of heated debate since the early '80s, when indigenous peoples raised the issue of their self-determination at the UN, but particularly since 1989, when the U.S.S.R., Czechoslovakia, and then Yugoslavia dissolved into lesser constituent parts<sup>49</sup>. I now present a sample, necessarily limited and simplified, of the current conceptual perspectives on the subject culled primarily from academic sources. While my sample is hardly scientific, it is hopefully not unrepresentative. In any event, I pass on some of the responsibility for balance to Christian Tomuschat, editor of the recent enlightening collection of essays entitled *Modern Law of Self-Determination*, from which I draw the core of my sample <sup>50</sup>.

Jean Salmon, a contributor to the volume, traces the primary tension in the current debate to the conflict between the original view that self-determination is about a people's right to define its external political status and an emerging one that it is primarily about a people's right to internal democratic governance. The terms "internal" and "external", it is important to note, do not figure in any UN legal instrument addressing self-determination but saw light, as Gudmundur Alfredsson tells us, as "the later invention of political talking and scholarly writing"<sup>51</sup>.

The jurist Michla Pomerance was an early user of this bifurcate vocabulary. He asserted that the concept of self-determination contained an "external" referent, which is the right to be free from alien rule, and also an "internal" one, which is the right to select one's own government and to continuously assent to it via the regime of representative democracy<sup>52</sup>. Antonio Cassese likewise uses the terms "internal" and "external" but understands the former to mean a people's right to an ongoing say in the choice of its political system rather than to a particular form of that system, such as representative democracy<sup>53</sup>. Cassese's position, unlike Pomerance's, thus harmonizes with that of the International Court of Justice as expressed in its decision *Concerning Military and Paramilitary Activities in and Against Nicaragua* which upheld a state's right to fashion the political regime of its choice. "[A]dherence by a State," the Court said, "to any particular doctrine does not constitute a violation of customary international law...."<sup>54</sup>

Significantly, neither Pomerance nor Cassese argue that self-determination is primarily internal. Indeed, Cassese makes it very clear that he is advocating the *extension* of the meaning of self-determination from its established "external" mode to include a new "internal" one. Nor does Cassese

remotely suggest that internal self-determination be set up as a bar to secession. The proposition then, which some are advancing, that the right of self-determination is primarily internal, and as such does not include the right to secede, constitutes a latter-day overlay on the already tentative semantics of "internal self-determination".

When the UN Charter was drafted, Cassese recalls, self-determination existed as a mere ideal which members promised to respect, primarily in the interest of interstate peace and stability. In the course of applying the principle the UN, dominated at mid-century by the Third World/Socialist bloc, moulded it to the particular task of legitimizing the liberation of peoples from colonial (read overseas) and, by analogy, racist (read white South African) and alien (read Israeli) subjugation<sup>55</sup>. The right, in other words, paradigmatically focused on liberation from external, not internal, oppression<sup>56</sup>.

Against this approach, as has been related, Western countries occasionally pushed an "internal" or extra-colonial component, as during the Congo crisis, that would allow peoples oppressed by Third World/Soviet bloc regimes to also invoke the right to free themselves from them. It was not until 1970, however, that a UN legal instrument, Resolution 2625, first recorded this Western perspective without, for all that, encoding the term "internal self-determination" as such. And there the matter essentially rests at the UN.

The Helsinki Declaration of 1975, however, which is increasingly viewed as binding on European states, endorses both external and internal self-determination:

By virtue of the principle of equal rights and self-determination of peoples, all



peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.<sup>57</sup>

More, the Declaration establishes the *continuing* nature of the right: "the right to self-determination is a continuing right, a right that keeps its validity even after a people has chosen a certain form of government or a certain international status."

Recent dramatic changes in Eastern Europe have greatly stimulated discussions of internal self-determination. Salmon observes that European legal texts now routinely enshrine the right of peoples to democratic governance. UN documents, for their part, have not followed suit. UN practice, nevertheless, displays a rising activism on behalf of democratic processes, as shown by the organization's support for elections in Cambodia, Afghanistan, Central America, Nicaragua, Haiti, Angola, Liberia. Salmon notes, however, that these cases simultaneously posed a threat to peace, which alone sufficed to attract and justify UN involvement.

More to the point, Salmon continues, the General Assembly adopted, in 1990 and 1991, resolutions that simply re-inscribed familiar values and their attendant tensions. Specifically, the General Assembly reiterated its support for all of the following: political pluralism in the world, non-interference in the internal affairs of states, and the electoral process as a way of determining the will of the people<sup>58</sup>. Which leads Salmon to conclude that the international community increasingly favours the concept of democratic governance, but remains divided on its primacy and content. As a result, he urges, a controlled process for assessing



democratic governance is now needed "to avoid the fight for democracy to become a pretext for some states to impose, on others, interventions, abuse of characterizations and ultimately totalitarianism" <sup>59</sup>.

Hitherto, both the value of political pluralism and the principle of non-intervention deterred the international community from constructing a compulsory principle of legitimacy to which states would be held. Such a principle was thought to be highly subjective, easily pretextual, and thus dangerous. Indeed, judgments on the legitimacy of states have been passed only in the rarest and most extreme of cases: Nazi Germany, and apartheid South Africa. This does not mean that international law thereby prohibits peoples from repudiating the regimes that they live under, but only that international society places itself in "a situation of legal lacuna" vis-à-vis that action <sup>60</sup>.

Which is not to say, either, that the UN has been silent on the question of internal political rights. On the contrary, as early as 1948, the Declaration of Human Rights provided that:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 of the 1966 *International Covenant on Civil and Political Rights* further compels states to honour their citizens' rights to political participation via a variety of mechanisms, including the vote. Finally, Resolution 2625, though it continues to forbid one state from intervening in the affairs of another, arguably does so in the limited context of states that respect the equal rights and self-determination of

peoples, and are possessed of a government representing all without distinction as to race, creed or colour.

*Grosso modo*, then, the concept of self-determination in international law has, over time, accumulated these manifestations: a broad legal principle that anchors interstate peace; a legal right that unravels colonization and analogous injustices; an emerging entitlement to democratic governance within states. Each semantic developmental step added to, rather than substituted for, previous steps. Assuming the correctness of this analysis, it becomes possible to clarify or even reconcile the several divergent if not contradictory interpretations of the right of self-determination now vexing the field.

A number of commentators — Asbjorn Eide, Amitai Etzioni, Thomas Franck, and Hurst Hannum come to mind — currently attempt to reduce/conflate the right of self-determination with what is increasingly termed a right to democratic governance<sup>61</sup>. Because Eide has been chair, in succession, of both the UN Working Group on Indigenous Populations and the UN Working Group on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities, his view merits particular attention. It is, in the Tomuschat volume, set out in six propositions<sup>62</sup>: 1. international law places a high and growing value on the stability of states; 2. this high valuation parallels a high valuation of democracy on the theory that stability is enhanced when authority rests on the will of the people; 3. self-determination is primarily a right to democratic governance; 4. only the practical impossibility of democratic governance justifies secession; 5. apart from cases of colonialism and recent alien occupation, all alternatives must be attempted before secession can be justified; 6. the whole people of a territory, and not just a single group,

is the beneficiary of self-determination.

Consistent with the above, if not with history, Eide then relates that even the struggle against colonialism (for which, curiously, he mainly cites the American Revolution!) was a struggle for democracy rather than identity. Extending this logic, he then concludes that if lack of democracy is generally the problem, then the establishment of democracy or internal self-determination, rather than external self-determination with its included right to secession, is generally the remedy. Eide, it is clear, vehemently disfavours secession. He grants its automatic legitimacy in three instances only: colonial domination, post-1945 alien occupation, and where a federal entity has theoretically preserved its constituents' secession options as was arguably the case in the U.S.S.R. and Yugoslavia <sup>63</sup>.

Eide's political vision of the world thus confirms states as the proper guarantors of international law and order; it identifies "ethnonationalism, in its expansionist, exclusivist and secessionist modes" as one of the greatest threats today to international peace and human rights; and it regards the right to self-determination as dangerously complicitous with that threat <sup>64</sup>. The proper response to the upsurge in ethnonationalism, he argues, is not more (external) self-determination, but enhanced protection for groups, "national confidence-building", and the preservation of the territorial integrity of states <sup>65</sup>.

Eide's successor at the UN Working Group on Indigenous Peoples, Erica-Irene A. Daes, exhibits a markedly different outlook on these issues <sup>66</sup>. Reading Resolution 2625 to say that constituent peoples of an independent state may not create new states except when faced with grievously exclusivist or undemocratic regimes, she remarks, with characteristic verve, that

such peoples would revolt anyway, law or no law! Legally, nevertheless, she proposes that such abuse be analogized to colonialism and the same remedy extended: i.e. full self-determination. Politically, however, she emphasizes, the options on the ground may be far richer and more fruitful. In the case of indigenous peoples, for example, she creatively urges that they be conceptualized as having been barred from the original act of state-building, or authorship, to which they must now be invited to belatedly assent through brand-new negotiations with the enclosing state.

International law, she continues, should thus entertain a "new category" of self-determination for indigenous peoples aimed at fostering the successful rebuilding of states. Under it, states would be held to a duty to accommodate demands, while indigenous peoples would be held to a good faith duty to reach agreement<sup>67</sup>. Daes emphasizes that this new category should not in any way be seen as a second-class form of self-determination, but simply one that is attentive to the specific circumstances of many indigenous-state relations. Indeed, as has been noted, the UN Working Group on Indigenous Peoples, under her leadership, recognized in the summer of 1993 the full right of self-determination of indigenous peoples.

Unlike the UN functionaries Eide and Daes who, each in his or her own way, place states at the center of the discussion of self-determination, the academic Otto Kimminich reminds us that states and international organizations are incapable of bestowing or removing self-determination from peoples, who possess it as an inherent right. However, states can and have repeatedly lent recognition to the exercise of the right — in colonial as well as non-colonial situations. What they recognize, in turn, is unique in international law for self-determination "is attributed to an entity which

is not a legal person", but only a potential one<sup>68</sup>. Recognition, then, is about process: a people is identified; its right is assessed; the right is actualized; the status achieved is recognized by established powers.

Kimminich notes that the right to self-determination encloses four types of claims that variously manifest internal and external features but that nevertheless form part of a single right. The claims are: to create a new state, to reject external coercion, to overthrow an existing regime, to obtain special protection within an existing state. Finally, Kiminich asserts, self-determination is continuously exercisable, which does not mean that peoples may wantonly destroy states<sup>69</sup>. On the other hand, international law cannot, in justice, compel a people to suffer *in extremis* before it will accede to their self-determination demand.

Several scholars inhabit the middle ground between the states-privileging and peoples-privileging poles represented above by Eide and Kimminich respectively. I place, for example, Christian Tomuschat here. He observes that the UN Human Rights Committee has already interpreted the language on self-determination in Article I of the two International Covenants on Human Rights to mean exactly what it says: *all* peoples have the right to self-determination<sup>70</sup>. So much for the "who" of the right. As for the "what", he continues, self-determination, unlike the grant of autonomy and self-government, always confers the included right to independent statehood<sup>71</sup>. On the other hand, Tomuschat notes, relevant international law instruments consistently reject a right of secession except as a remedy of last resort<sup>72</sup>.

In practice, Tomuschat finds that when a separation or secession issue erupts, international

society vacillates between two options: ignoring the problem as one of fact and not of law, or evaluating the legitimacy of the would-be state. Increasingly, international society does the latter. Which means that criteria of legitimacy become all-important. Secession being such a potentially explosive matter, Tomuschat urges that mechanisms be put in place, and criteria evolved ahead of crises, to guide such legitimacy evaluations. On a related tack he suggests, confusingly in my opinion, that international law develop a new "federal" right to self-determination for ethnic constituents of states not otherwise entitled (he does not say why!?) to the classic form of self-determination so that they may have a "say over what are essentially their own matters, without destroying the overarching institutions of government" <sup>73</sup>.

A contributor to Tomuschat's volume, Dietrich Murswiek, closely tracks Tomuschat's views but adds the useful reminder that in a world wholly partitioned into states, a continuing fidelity to the right of self-determination must of necessity anticipate and tolerate some dismemberment of states. So, although few commentators support a right to secession on demand so to speak, most would not abolish it entirely either. The best rule, Murswiek agrees with Tomuschat, is secession as a last resort. It, he further asserts, is available only to culturally distinctive peoples living in delimited territories where they constitute majorities. Where a people fails to meet these criteria, Murswiek, like Tomuschat, advocates an alternate form of self-determination that could guarantee such a people minimal autonomy, particularly in cultural matters. Should the enclosing state refuse even this much, "then the people must have a right of secession in order to exercise its self-determination" <sup>74</sup>. Murswiek proposes, in other words, a fundamentally *relational* concept of self-determination: all peoples have the right to internal self-



determination; where states deny them this right, they join the more select group of peoples entitled to external self-determination as well.

Douglas Sanders, in sorting out the self-determination literature as it might apply to indigenous peoples, discovers a similar relational perspective in the three approaches that he identifies, each of which offers a lesser degree of self-determination to indigenous peoples than the previous<sup>75</sup>:

1. *All peoples have the right to self-determination.* Those in overseas colonies may assert any status that they choose at any time. Those colonized within a surrounding state also possess this right. It is, however, balanced against the state's right to its territorial integrity but, in any event, minimally entitles them to some form of autonomy. A denial of the latter, and of human rights, triggers the option for independence. Sanders believes that the UN Working Group on Indigenous Peoples effectively upholds this position today in relation to indigenous peoples.
2. *Indigenous peoples, like all other individuals and groups within surrounding states, have the right to internal self-determination.* For groups, this should translate into some form of decentralization or autonomy. Denial of this right conceivably justifies secession.
3. *Indigenous peoples are cultural minorities.* The latter are entitled to the preservation of their distinctiveness. Where the distinctiveness is great, as is typical with indigenous peoples, this entitlement may require autonomy or self-government.

Patrick Thornberry, who writes extensively on minority rights, makes a particularly thoughtful



contribution in the Tomuschat volume. He distils the following propositions on the right to self-determination from UN instruments up to and including Resolution 2625: 1. self-determination is available to all peoples and is not exhausted at independence; 2. it carries its own value and also advances peace and friendly relations between states; 3. it underwrote the decolonization process; 4. its "nationalist" aspect to date prevails over its "democratic" one; 5. the latter exists in muted form in international law.

Thornberry thus acknowledges that internal self-determination is both more recent and tentative a right than external self-determination. The former rests, furthermore, on a "representativity" test that leaves him skeptical. What happens, he asks, if an independent Quebec claims that it represents the whole people of its territory and the Inuit assert otherwise? Nonetheless Thornberry, like other middle grounders, urges the creative design of a suitable space between repression and secession for the protection and empowerment of groups enclosed within states. Federalism might be a way. He reminds us though that the only international law tool currently available for accessing this middle space is the individual right to political participation, not the collective right to autonomy, which does not as such exist in international law. Yet, he rightly notes, individual human rights derive their very potency from the right of self-determination:

The relationship between self-determination and individual human rights humanizes the former and lends to the latter a powerful *metalanguage* to harness the totality of a people's demands and aspirations.<sup>76</sup>

In fact, Daes expresses a similar sentiment. The denial of self-determination to indigenous peoples, she

says, "will leave the most marginalized and excluded of all the world's peoples without a legal, peaceful weapon to press for genuine democracy in the states in which they live"<sup>77</sup>.

I give the last word in this brief review of current perspectives on self-determination to Gudmundur Alfredsson, an indigenous scholar. Though he does not quite put it that way, Alfredsson, in the Tomuschat volume, asks that states and scholars not toy with peoples' lives and hopes. There is no principled gain, and only opportunistically-sown confusion, he points out, in mixing terms that traditionally carry distinctive meanings. For this reason, he will not use the term "internal self-determination". Absent an external component, self-determination just isn't self-determination. Therefore, if a right is being held out that precludes this component, it should be so labelled: human rights, autonomy, and so on as befits its content, but not self-determination. Alfredsson does not thereby belittle these other rights. On the contrary, he says: "Respect for these rights is indeed likely to reduce the demand for external self-determination and thus to strengthen peace and security."<sup>78</sup> But, he continues, to the extent that adding an "internal" component to self-determination is but a pacifier and a way of avoiding external self-determination, it is to be avoided<sup>79</sup>.

### **A Proposed Vision of Self-Determination on the Eve of the New Millennium**

I offer two proposals: 1. that self-determination be conceptualized in every case in its broadest meaning, and 2. that its exercise, where potentially peace-threatening, be regulated by designated international institutions applying articulated criteria and processes.

The conceptualization of self-determination

Self-determination, I assert, has been the single most powerful legal concept shaping the post-war world. Beginning life in the UN Charter as the foundation for interstate respect and peace, it went on to become a right of peoples to reject colonial and analogous subjugation, and is now invoked to mean a right to democratic governance. Scholars like Cassese, Kimminich, and Thornberry have expressed their comfort with this cumulatively expansive meaning of the concept. I share their outlook.

Ranged against them are others, such as "blue-water" and "internal self-determination" only apologists, who would narrowly specify the "who" and "what" of self-determination respectively. I have shown that the existing corpus of international legal theory and practice weighs against these restrictive approaches. I add here: fortunately. For a legal principle, in contrast to a legal rule, must remain broad, open-ended, and amenable to historical adaptation if it is to remain useful. The opportunism and partisanship that, however understandably, drove the blue-water thesis and that, in my view, now drives certain commentators' privileging of internal over external self-determination would, if unchecked, radically limit, and indeed de-commission, a major principle of international law that is still needed to rescue the weak from the array of, subjugation that they continue to experience, external and internal.

To limit the exercise of external self-determination to the decolonization context is to force all present and future claims against subjugation to mimic a single type of past claim or be ignored. In consequence, when subjugations shaped by later configurations of history arise, as they always do, international society finds itself applying the principle

of self-determination through the side-door of exception-making, as in the several cases of state making and unmaking described earlier, rather than through the front-door of the ongoing elaboration of the concept. This is foolishness.

Self-determination claims today are being asserted in a variety of political settings: colonial (French Polynesia), federate and confederate (Eastern Europe), settler (the Americas), and co-settler (Quebec). In some, ethnic and territorial disentanglement will be virtually impossible, or extremely costly in material and psychic terms, or even unethical and, perhaps, ultimately undesired. Yet the historical and contemporary injustices that those situations embody may equal, or even exceed, those of the paradigmatic colonial moment. A settler state in the Americas is, after all, nothing other than a colonial state that succeeded so well that it did not have to go home. It is what Algeria would have become had the "pieds noirs" won. And, surely, the greater the success of the invading society, the greater the deprivation of the invaded. Which manifestly cannot mean that the latter are entitled to less redress than classically colonized peoples. That is the quandary for indigenous peoples in settler states: greater loss, but also greater entanglement.

The call by some that self-determination be reduced to an entitlement to internal democratic governance picked up steam in the West after the fall of Communist regimes in Eastern Europe. While one could make a perfectly principled and indeed welcome case for rendering explicit yet one more facet of the right of self-determination — i.e. democratic governance within a state — the West's unclean hands with regard to its trump democracy card, as in the Congo crisis, leaves me nervous about the motive, timing, and implementation of the call.

The better approach, in my view, is Cassese's, who simply urges that self-determination be enlarged from its original external focus to include an internal one, without prioritizing either. Good reasons support this approach. To begin with, the separate values that the two foci enshrine — identity and democracy respectively — both serve society. They do so equivalently, and ultimately synergistically. Western and/or majority peoples too often miss this point because they take their dominant cultures (at the national or international level), which guarantee them their identity, for granted. For others not so privileged, a "democracy" constructed along an alien majority's cultural conventions may not feel like democracy at all, but more like manipulation, rationalization, and smokescreen. Secondly, non-prioritization prevents governments that resist outside scrutiny of their fealty to human rights and democracy from raising against that scrutiny the shield of self-determination understood, as they would like it, in its external sense only.

In any event, we have, in theory only admittedly, arrived at a point in human history where no state, existing *or to be born*, may violate any longer the individual human rights contained in the growing compendium of international human rights instruments. Simply put, international responsibility follows automatically upon the privilege of international recognition. This fact alone dilutes the point, sometimes raised, that individuals are protected more competently, and more equitably, as citizens of an existing state than as members of traditional "backward" communities that might become states. Do the plights of Tibetans, East Timorese, West Papuans, Tahitians (whose lands, seas, and bodies remain prey to this day to French nuclear idolatry) — all of whom reside within existing states not of their making — support the above point?

In practice, the point is neither true nor untrue for the simple reason that it grossly overgeneralizes the practices of the two groups that it falsely sets up and then compares. The point, that is, implicitly reiterates the 19th century racist view that members of traditional communities (i.e. mainly non-western) are not individuals possessed of the capacity and space for personal agency but live out their lives as mere robotic limbs of a reified community. Serious social theory now understand that personal agency and social constraints exist in all societies. See, for example, the agency expressed in the challenges to gender inequality that indigenous women in the U.S. and Canada mounted not long ago against their "traditional" communities, as recounted in the famous cases of *Santa Clara Pueblo v. Martinez* and *Lovelace* <sup>80</sup>.

At the same time, several scholars, particularly from the non-western women's world, have raised some important points. First, that *any* society's representations of its theory and practice of equality and inequality are culturally laced, and hence in need of deconstruction. Second, that the amelioration of these representations, where they harm women, needs to avoid the consequence of irretrievably alienating victimised women from their communities. Third, such scholars argue, without dismissing the benefit of intercultural dialogue, that the discussion of the amelioration of the conditions of women in particular countries must be guided by, and thoroughly engage, those very women themselves, in their several walks of life <sup>81</sup>. In any event, it is important to recall, as Thornberry emphasises, that the full untruncated version of self-determination stands as the very *metalanguage* of all other rights. Without it, the latter are far more difficult to assert <sup>82</sup>.

There remains the thorny question of the tension



between the self-determination of peoples and the territorial integrity of states. Difficult, but not more so than, say, the occasional tension that erupts, in the U.S., between the rights to speech of one party and to property of another that its Constitution simultaneously protects<sup>83</sup>. Any right exists in a constellation of other rights. The essence of the legal enterprise is to balance them in the specific contexts in which they clash. It is not to clip the wings of these rights in the abstract, for all time. In this regard, Resolutions 1514, 1541, and 2625 alert us to nothing more than the balancing tasks that lie ahead. And we are given some guidance as to how the balancing is to proceed: we know that self-determination has *jus cogens* status whereas the territorial integrity of states does not; and we have heard the ICJ tell us that people define territory and not the other way around.

The final guidance, I might add, comes from history itself, which amply records the ebb and flow, however passion-driven, of the constitution of subjectivities, peoples, and states. No law can, nor in the final analysis need, stem that tide. The cost of trying has generally been paid for in far, far too many lives. The most that law can, and should, do is to provide benign conditions — whether counted in years, decades, or centuries — for the development, engagement and, as needed, transubstantiation of these subjectivities. In this regard, Eide's clarion call to preserve the primacy of the state, and its territorial integrity, strikes me as strangely ahistorical, and therefore utterly unworkable.

Law can pace, but not interdict, evolution. The concepts "peoples", "states", "self-determination", "secession" are not so many cakes baked from finite ingredients, but legal tools that international society uses to mediate the ongoing struggle in the world between, among other things, power and need, order



and justice, the territorial integrity of states and the self-determination of peoples. And the end product of such mediation need not always be the re-drawing of borders. That, however, depends largely on the breadth of options offered at the starting point.

The regulation of potentially peace-threatening assertions of self-determination

Though I advocate an expansive reading of the meaning of self-determination, I am, like most, aware of, and appalled by, the destructive force the concept unleashes when teamed up with a xenophobic political movement. At one level, we simply live with the knowledge that any edifying principle of human conduct is subvertable. At another, we struggle to find mechanisms for foiling the subversion. That being said, I believe that the denial of the right of self-determination generally feeds more xenophobia, and hence violence and destruction, than its recognition. Protection from the xenophobic subversion of self-determination will come, then, not from the semantic mutilation of the right that Alfredsson decries, but from the establishment of criteria, institutions, and processes that discipline its exercise.

The discipline that I envisage is about pacing the exercise of a self-determination right that is being asserted. It is not about gate-keeping, or declaring *a priori* which people can or cannot assert the right. On the latter point, I share Rodolfo Stavenhagen's view that if a human group is sufficiently motivated, and capable of asserting its political identity and will as a people, it will do so. Indeed, international law anticipates this for it offers in the right of self-determination, as Kimminich notes, a unique tool that enables an entity that is not yet a legal person to become one: a miracle of power for the powerless that

the 1975 Helsinki Final Act further declared endlessly reproduceable.

But endless is not unconditional. Since a state, or another people or peoples, may be seriously injured by a particular assertion of self-determination, international society must require that the assertion be neither brusque nor wanton. It consequently needs to formulate guiding criteria, and construct canalizing institutions and processes, to tame the assertion of self-determination. I offer some suggestions below that others, more directly involved with international activities, are better placed to develop.

### *Criteria*

As asserted earlier, the construction of a people's identity is an ongoing and subjective matter that international law cannot hope to command. And where there is a people there is, potentially, an assertion of self-determination. For international society to sanction that assertion in one context and not another is, I have argued, legally invalid as well as unjust. The criteria I speak of here thus relate, not to the "who" or "what" of self-determination, but its "how". The "how" question arises in the difficult cases (and there are many) where one or more party refuses — for reasons usually linked to its excessive power, or excessive weakness, or excessive entanglement in the matter — to recognize the self-determination asserted by another. How is international society to proceed conceptually in such a case?

To begin with, I think it important to remember that international law is only competent to recognize, not confer, the right of self-determination which, as the phrase "All peoples have the right of self-determination..." makes clear, inheres in peoples<sup>84</sup>. Whether

or not a people exercises this right and, if so, whether alone or in association or union with another depends on historical circumstances. These constantly change, bringing about, among other things, new peoples and fading out, gradually or violently, older ones. The French Revolution, for example, promoted a French



Left, Mr. Conrado Valiente and, right, Mrs. Erica Daez. Geneva 1995. [Photo Beatrice Weyrich]

identity while simultaneously phasing out the Breton one. Indeed, all states, because they organize on the basis of territory rather than descent (real or putative), are multi-ethnic in origin, even if most later also mimic the descent "feel" by cultivating a "national culture".

States welded by such "national cultures" endure for greater or lesser spans of time depending on their constituents, the manner of their syntheses, and the pressures they encounter. In this century, the former U.S.S.R. and Yugoslavia proved short-lived, the original Pakistan even more so, and Canada now appears tentative. Conversely, Europe may one day assume an identity that supplants the political significance of its constituent parts, as may the Association of Southeast Asian Nations (ASEAN), the South Pacific Forum, the North American Free-Trade Agreement (NAFTA) constuct etc...

International society thus needs to meet and ameliorate both sets of tendencies: centripetal and centrifugal. Setting aside the classic colonial case (where the metropolis still governs), the issues presented when an assertion of self-determination is contested vary depending on whether the contest pits settler and indigenous (the Americas), or two or more

settlers (Quebec and the remaining Canadian provinces), or two or more adjacent natives (the former Yugoslavia), against each other. In none of these cases can international law validly declare that one party has the right of self-determination but another does not. It can, however, identify criteria that will guide it to urge, or impose as need be, on the parties concerned a reviewable compromise based on its differential weighing of the criteria that they exhibit.

Specificity and tenacity of identity, the will to form a community, length of occupation of a territory, availability of an acceptable alternative solution or location, impact on other peoples — these are among the criteria that I would carefully weigh in assessing and reconciling competing claims. Thus Quebec, on most of the above criteria, would have to accommodate a "weightier" right of self-determination of the province's indigenous peoples before international society should recognize its claim to the same right <sup>85</sup>.

The term "immemorial" is increasingly used to characterize indigenous peoples' connections to the lands they claim. I do not believe that any people need meet such a high standard for the recognition of its assertion of self-determination in a particular territory. For one thing, the standard fits but occasionally (where no record can historically place the peoples concerned anywhere other than where they are). Most peoples, including some denominated indigenous today, have done what history compelled or beckoned them to do: i.e., move. And history, while hopefully remediable, is rarely reversible. Besides, it would be grossly unjust, in many cases, to even attempt reversal. Are the Native American peoples living west of the Mississippi River, for example, who were forcibly removed there by the U.S. government more than a hundred years ago, to be denied the exercise of their self-determination in the territories in

which they have now sunk new roots?

The reverse situation also obtains. The Jewish people, politically and later legally, managed to convince the world to accept its return to a homeland after a virtual absence therefrom of essentially 1,000 years. There, its perceived lack of a safe alternative for itself overrode other considerations. The rebirth of Israel, the birth of Bangladesh, the possible birth of Quebec — these are developments to carefully assess, condition, and ameliorate on behalf of the adjacent peoples they impact (Palestinians, West Pakistanis, and the indigenous peoples of Canada respectively), but not forbid. Who should do the assessing, and using what processes, are scanned below.

### *Institutions*

An institution that mediates or arbitrates contested self-determination claims could be lodged in a number of systems: the UN, regional organizations, special tribunals, NGO networks etc... The key requirement is that it build in two features: 1) neutral or disinterested decision-making personnel, 2) the obligation to hear all interested parties on an equal basis. Disinterestedness — which neither the Netherlands nor Belgium could claim in the cases of West Papua and the Congo respectively — is critical if an opinion or directive that the institution issues is to command respect. But disinterestedness alone can be singularly uninformed as well as paternalistic, which defects doom the resolution process as surely as partisanship. Hence, the need to receive regular input from those most touched by the contest.

The UNWGIP, in this regard, came far closer to displaying the above features in its work in the last decade than, say, the International Labour

Organization (ILO) in its 1989 formulation of *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*. A handful of experts formally independent from interested parties guided the UNWGIP's mission of reconciling the interests of states and indigenous peoples. These experts, in turn, dealt with interested parties — states, indigenous peoples, and NGOs — in like fashion, at least at the formal level: by giving all an equal voice, and by generally incorporating in their work-product language and ideas generated from across the broad spectrum of interested parties.

In this sense, the UNWGIP levelled the playing field significantly as between the powerful and the needy with, in my view, two remarkable results: the completion of a Draft Declaration of Indigenous Rights that, formally speaking, substantially redresses the political imbalance existing between states and indigenous peoples at the beginning of the process; the generation of a dramatically heightened awareness, world-wide, of the plight and needs of indigenous peoples. These achievements, in turn, set the mood, means, and standards for the bilateral negotiation between states and indigenous peoples that must still occur to secure, on the ground, what has been set out in the Draft Declaration.

Nevertheless the UNWGIP model could be improved in several respects. For one thing, all interested parties, and not just states, should jointly appoint its experts. For another, the formally equal access to its forum needs to be translated into real equality. Either more funds will need to be made available to indigenous peoples hitherto unable to participate, or the UNWGIP will need to rotate its sessions geographically to reach them. Should a permanent Forum for indigenous peoples be created at the UN, as has been proposed, these and like-spirited



actions will hopefully be incorporated.

Self-determination contests are not, of course, limited to indigenous/state conflicts. The Balkan tragedy attests to that. The excessive power (demographic and otherwise) of some (Orthodox Serbs), excessive weakness of others (Muslim Bosnians and Catholic Croats), and excessive entanglement of all, generate the arrogance, desperation, and passion that, in my view, rule out the possibility of an internally generated resolution that could be peaceful. International society — disinterested but legally and morally engaged — simply has to intervene<sup>88</sup>. Exactly how has eluded far more experienced minds than mine. Nevertheless, the ideas I offer on process in the next section may not be unhelpful.

#### *Processes of regulation*

Here, too, I offer but two points. Where contests over self-determination prove intractable and destructive, international institutions must impose a course of action that mandates 1) incremental, and 2) revisable, adjustments in the relationships of the contestants. I cannot overly emphasize my belief, supported by the well-known ability of human communities to adapt, that, given substantial accommodations, and the guaranteed possibility of reviewing these, such communities may well lose the sense of urgency that feeds their intransigence in the first place. Pacing the satisfaction of demands over a reasonable time span (which will be different from case to case) may allow contestants to adjust, along the way, their positions in a direction that their opponents can accept but that could not be so framed in a one shot do-or-die situation.

In the case of indigenous/state conflicts over self-



determination that do not resolve bilaterally, the approach I call for would borrow techniques from the FSM negotiations, (which *were* bilaterally negotiated). The concerned state would be required to recognize the right of self-determination of indigenous peoples within its borders, up to and including secession. At the same time, international society, acting through a designated and disinterested institution or collection of institutions — intergovernmental or NGO as befits the situation — which is acceptable to the disputants, would impose upon both parties the duty to negotiate a *modus vivendi* for a fixed number of years during which the expressed needs of the subjugated party would be substantially met. At the end of the period(s), bilateral negotiations, internationally supervised as need be, would resume. If secession proves ultimately necessary, it must be accepted, though again internationally supervised to assure equity and peace. This is quite different from formally holding that secession is a remedy available only *in extremis*, which position merely drives conflicts to reach that *in extremis* point.

In my view, the recent referendum in Quebec, which was popularly understood as a referendum on secession from Canada, strikingly bears this out. But for a percentage point or two, a majority of the citizens of that province might well have been pushed to adopt a solution *in extremis* because an intermediate solution they agreed to a few years ago — Canada's recognition of Quebec as a "special society" — was thoughtlessly rejected out of hand by Anglophonic Canada. The current Canadian Prime Minister, Mr. Chrétien, clearly understands the consequence of this past rigidity and is attempting to resurrect the earlier compromise approach. Whether the Anglophonic provinces will now awaken to the same understanding is another matter.

Through all this, then, the institution designated to defuse self-determination conflicts is engaged in the tasks of identifying claimants, dialoguing directly with them, weighing their relative rights, and actualizing them in the least provocative way possible: in a revisable increments. Finally, just as the medium can be the message, so can the institution itself be the process. That is, intractable conflicts are often so because their leaders box themselves Vis-a-vis their followers into positions from which they are then unable to extricate themselves. There is something wonderfully face-saving in being able to grudgingly report back to your group, when you do not get all that you want when you want it, that "International society compelled us to accept this solution".

## Conclusion

Self-determination is a name for a social phenomenon which, like all social phenomena, contains the past still active within it, and which, like all social phenomena, also contains within it possible futures which are ours to choose. (Philip Allott)<sup>87</sup>

There is no getting around that self-determination functions as all of these things: poetry, vision, right, and inconvenience. The legal dimension of self-determination can co-exist happily with its poetic or visionary ones so long as the inconvenient or destructive energies often spawned by the latter are channelled through an international mechanism that is not that, with such a mechanism in place, many if not most self-determination claims would resolve themselves into arrangements of association between the claimants, for three reasons.

First, in any conflict, parties are rarely internally monolithic about what they want. When peoples live side by side for a long time, however unsatisfactorily, some positive relationships develop that not all wish to terminate. Second, while the new gargantuan economic forces that now enmesh the world provoke, in my view, through the harsh consequences that they unleash, the violent separatist movements we now see that viscerally grab as grab can a part of the ill-understood global pie, that very same economic interdependence may, as the dust settles, lead most peoples to adapt to, as well as ameliorate, the new condition of interdependence. Third, as the process I suggest becomes routine, the ideology which has mesmerized us all in the last centuries to sacrifice millions of lives — i.e., the ideology of the nation-state, which compels cultural and political allegiances to merge into a single and ecstatic union — may come to be seen as outdated, silly, and tragic, causing us to bury it.

Until that time comes, however, international law cannot, without stimulating confrontations to the death, deny *a priori* the right of self-determination to peoples injured by the status quo while upholding it for states privileged by the same. That history is fundamentally irreversible, or rights not always wholly exercisable, is one thing; that the latter be simply ignored or, worse, erased, is another. A sense of tragedy, with possibility for at least psychological closure, attends the first stance. Only continued outrage can cling to the latter. Finally, I wish to note that I doubt very much that self-determination is the greatest threat to peace today. A grotesque, mass media-displayed, and rage-engendering inequality of power — to command material resources, to construct knowledge, to devise systems of law — is. This, in the midst of the largest, most indiscriminate and lucrative, states-assisted global sale of arms that the world has ever seen.

## Notes

1. I thank my anthropologist-lawyer colleague, Alain Bissonnette, whose humanity and work I deeply respect, for inviting me to submit this monograph. I am honored that his institution, the International Centre for Human Rights and Democratic Development in Montréal, chose to publish the present work and offered resources to help me complete it. Additionally, I express my infinite gratitude to the John D. and Catherine T. MacArthur Foundation for enabling me to do the reading, thinking, and writing over the last years that, among other things, gave birth to the present work. Finally, I thank David Trubek, dean of Global Studies at the University of Wisconsin-Madison, for offering me the opportunity and trust that set the engine rolling!
2. Coetzee 1980: 133.
3. Allott 1993: 177-210.
4. Versions of this proposition have been advanced by Eide 1993, Etzioni 1992-93, Franck 1992, Hannum 1990.
5. Davis 1989: 16, 24; Akehurst 1984: 15.
6. Balkin 1988: 19-20.
7. Renan 1990: 8.
8. Important texts on self-determination are: Alexander and Friedlander (eds.) 1980, Critescu 1981, Ofuatey-Kodjoe 1977, Pomerance 1982, Rigo Sureda 1973, Umozurike 1972, Tomuschat (ed.) 1993, Twining (ed.) 1990. A work focusing on the indigenous interest in the subject is Assies and Hoekema (eds.) 1994. For a helpful annotated bibliography, see Knight and Davis 1987.
9. See Elshtain 1991.
10. Rigo Sureda 1973: 17.
11. International Court of Justice 1975: 122.
12. The term was apparently first coined by mid-19th century German radical philosophers. Socialist conferences then embraced it to support oppressed peoples (Umozurike 1972: 3). After WW II, Vladimir Ilyich Lenin and Woodrow Wilson became ardent promoters of the concept, for entirely different reasons.
13. See Hirayasu 1987.
14. Federated States of Micronesia, a couple of years ago, received a seat at the UN.

15. Gros Espiell 1979: 167.
16. *Vienna Convention on the Law of Treaties*, art. 53.
17. Cassese (ed.) 1979: 147.
18. For the impact of Christian theology on European concepts of sovereignty see Williams 1990.
19. See Suzuki 1976: 784.
20. Stavenhagen 1990: 66.
21. See Crawford 1979 for a classic reference on the formation of states.
22. *Ibid.*: 36.
23. Anon. 1980: 809.
24. Morris 1992: 78.
25. Hannum (1988: 672) specifically urges that indigenous peoples drop their claim to self-determination to quell the nervousness that it generates.
26. For a standard study of autonomy see Sohn 1980.
27. Pomerance 1982: 333.
28. See Dinstein, 1981
29. See note 8 *supra*.
30. Nothing stops a state and its peoples from negotiating a domestic autonomous status for the latter at the same time that the latter pursue the right of self-determination under international law. See Bissonnette 1993.
31. Rigo Sureda 1973: 77.
32. *Ibid.*
33. *Ibid.*: 145.
34. For political rather than legal reports on the West Papua question see Savage 1983 and Sharp 1977.
35. Heraclides 1991: 58.
36. *Ibid.*
37. *Ibid.*: 62.
38. Ofunkey-Kodjoe 1977: 108.
39. Rigo Sureda 1973: 104.

40. Ofuately-Kodjoe 1977: 127.

41. *Ibid.*: 189.

42. Pomerance 1982: 322.

43. For an account of Bangladesh's secession see Nanda 1980.

44. All "blue-water" colonies, of course, have not been dismantled. Depending on one's definition, some very blue ones remaining are: Tahiti, Kanaky (New Caledonia), Ka Pae' Aina (Hawai'i), Puerto Rico, Antigua.

45. Unfortunately, I just received a copy of *Sovereign Injustice: Forcible Inclusion of the James Bay Crees, and Cree Territory into a Sovereign Québec*, published by the Grand Council of the Crees 1995, and could not carefully study it there and then. My quick perusal of the book, nevertheless, leads me to offer the following comments. The authors argue that the recognition of self-determination is not a precedent for a right to secede. I would instead put it this way: the right of self-determination always includes, but does not necessarily trigger, the sub-right to secede. I wholly applaud, and am moved by, the magnanimous Cree thinking on the question of interwoven rights of self-determination in Canada, as represented in this sentence: "The Crees respect the right of all peoples in Canada, including Quebecers, to self-determination. We also respect the right of these people to seek a more satisfactory relationship with the rest of Canada. However, the exercise of these rights must not in any way prejudice or be at the expense of the status and fundamental rights of aboriginal peoples (particularly our own Cree right to self-determination)." [p. 430]

46. For a report on the history of this achievement see Barsh 1994.

47. International Court of Justice 1975.

48. Stavenhagen 1990: 69.

49. Two well-informed and disturbing accounts of the break-up of Yugoslavia are Denitch 1994 and Hall 1994.

50. Tomuschat (ed.) 1993.

51. Alfredsson, in Tomuschat (ed.) 1993: 50. D. Sanders relates that the two terms were coined in the course of deliberations of the UN Human Rights Committee. (Sanders, in Tomuschat (ed.): 80).

52. Pomerance 1982: 310, 314.

53. Cassese (ed.) 1979: 138.

54. International Court of Justice. Also quoted by Salmon, in Tomuschat (ed.) 1993: 258.

55. Cassese (ed.) 1979: 140.
56. *Ibid.*: 134.
57. Contained in Henkin, Crawford Pugh, Schachter, Smit 1980, *Basic Documents Supplement to International Law: Cases and Materials*, third edition, St. Paul, Minnesota, West Publishing Company.
58. Salmon, in Tomuschat (ed.) 1993: 273-277.
59. *Ibid.*: 282.
60. *Ibid.*: 256.
61. See note 4 *supra*.
62. Eide, in Tomuschat (ed.) 1993: 147.
63. Article 72 of the 1977 Constitution of the U.S.S.R. preserved a right of secession for its constituent republics; and the original republics of Yugoslavia, at the time of its break-up, were negotiating a loose confederation.
64. Eide, in Tomuschat (ed.) 1993: 140.
65. *Ibid.*
66. For a summary of her point of view, see Daes 1993.
67. *Ibid.*: 9.
68. Kimminich, in Tomuschat (ed.) 1993: 86.
69. *Ibid.*: 94.
70. Tomuschat, in Tomuschat (ed.) 1993: 3.
71. *Ibid.*: 5-6. The UN Sub-Commission on Human Rights likewise holds that self-rule/self-government/autonomy and self-determination are two distinctive legal complexes (Rosas, in Tomuschat (ed.) 1993: 233).
72. Tomuschat, in Tomuschat (ed.) 1993: 5.
73. *Ibid.*: 17.
74. Murswiek, in Tomuschat (ed.) 1993: 38.
75. Sanders, in Tomuschat (ed.) 1993: 79-80.
76. Thornberry, in Tomuschat (ed.) 1993: 137.
77. Daes 1993: 11.
78. Alfredsson, in Tomuschat (ed.) 1993: 53.
79. *Ibid.*



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80. 436 U.S. 49 (1978); *Human Rights Committee Report*, Communication R. 6/24, G.A. 35th session, supp. n°40, UN doc. A/35/40 1980 (Constatation of the Committee).

81. See for example Andrews (ed.) 1996. See also Lãm 1994: 865-893.

82. My close observation of the indigenous-state confrontation in Ka Pae'Aina (Hawai'i) leads me to conclude that its indigenous people's assertion of a full right to self-determination functioned as the only key, in the last decade, to pry open, however partially, the chest in which the U.S. otherwise sequesters the human rights of its native peoples.

83. The typical question courts face is: can political groups deliver their messages in private shopping malls that would bar them but that otherwise invite in the general public?

84. This is how Articles I of both the *International Covenant on Economic, Social, and Cultural Rights* and the *International Covenant on Civil and Political Rights* begin.

85. The spirit of my judgment thus runs counter to that of the Franck, Higgins, Pellet, Shaw, Tomuschat work known as the "Pellet Report", which gives a narrowly positivistic, and even then unpersuasive, assesment of Québec's right to its territorial integrity in the event of its accession to sovereignty. For a critique of the report see Falk 1995.

86. As I write these lines, the news report the world's abandonment, rather than rescue of, the former Yugoslavia.

87. Allott 1993: 210.

## References

Akehurst, Michael, 1984: *A Modern Introduction to International Law*. George Allen and Unwin, London.

Alexander, Yonah, and Robert Friedlander (eds.) 1980: *Self-Determination: National, Regional and Global Dimensions*. Westview Press, Boulder.

Alfredson, Gudmundur, 1993: "The Right of Self-Determination and Indigenous Peoples", in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 41-54. Martinus Nijhoff, Dordrecht.

Allot, Philip, 1993: "Self-Determination – Absolute Right or Social Poetry?" in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 177-210. Martinus Nijhoff, Dordrecht.

Andrews, Penelope (ed.), 1996: "Traditional Law and Gender Equality: A Conflict?" *World Legal Studies*, Spring.

Anon., 1980: "Note: The Logic of Secession". *Yale Law Journal* 89: 802.

Assies, W. J., and J. J. Hoekema (eds.), 1994: *Indigenous Peoples' Experiences with Self-Government*. IWGIA, Copenhagen.

Balkin, Rosalie, 1988: "International Law and Sovereign Rights of Indigenous Peoples", in Barbara Hocking (ed.), *International Law and Aboriginal Rights*. The Law Book Company, Sidney.

Barsh, Russel Lawrence, 1994: "Indigenous Peoples in the 1990s: from Object to Subject of International Law?" *Harvard Human Rights Journal*, 7(33): 65-86.

Bissonnette, Alain, 1993: "Le droit à l'autonomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres". *Revue générale de droit*, 21(1): 5-25.

Cassese, Antonio (ed.), 1979: *UN Law/Fundamental Rights*. Sitjhoff & Noordhoff, Alphen dan aan den Rijn.

Coetzee, J. M., 1980: *Waiting for the Barbarians*. Penguin

Books, New York.

Crawford, James, 1979: *The Creation of States in International Law*. Clarendon Press, Oxford.

Critescu, Aureliu, 1981: *Le droit à l'autodétermination: développement historique actuel sur la base des instruments des Nations Unies*. Nations Unies, New York.

Daes, Erica-Irene, 1993: "Some Considerations on the Right of Indigenous Peoples to Self-Determination". *Transnational Law and Contemporary Problems* 3(1): 1-11.

Davis, Maureen, 1989: "Aspects of Aboriginal Rights in International Law", in Bradford W. Morse (ed.), *Aboriginal Peoples and the Law*. Carleton University Press, Ottawa.

Denitch, Bogdan, 1994: *Ethnic Nationalism: the Tragic Death of Yugoslavia*. University of Minnesota Press, Minneapolis.

Dinstein, Yoram, 1981: *Models of Autonomy*. Transaction Books, New Brunswick.

Eide, Asbjorn, 1993: "In Search of Constructive Alternatives to Secession", in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 139-176. Martinus Nijhoff, Dordrecht.

Elshtain, Jean Bethke, 1991: "Sovereign God, Sovereign State, Sovereign Self". *Notre Dame Law Review*, 66: 5.

Etzioni, Amitai, 1992-1993: "The Evils of Self-Determination". *Foreign Policy*, 89: 21-35.

Falk, Richard, 1995: *The Relevance of the Right of Self-Determination of Peoples under International Law to the Federal Obligations of the Federal Government of Canada Owed to the Aboriginal Peoples of Québec in the Context of Possible Accession to Sovereignty by Québec*. Report Submitted to the Royal Commission on Aboriginal Peoples. Research Project on the Fiduciary Obligations of Canada to the Aboriginal Peoples in Québec under International Law.

Franck, Thomas M., 1992: "The Emerging Right to Democratic Governance". *American Journal of International Law*, 86: 46.

Franck, Thomas M., Rosalyn Higgins, Alain Pellet, Malcolm N. Shaw and Christian Tomuschat, 1992: *The Territorial Integrity of Quebec in the Event of its Accession to Sovereignty*, in Committee to Examine Matters Relating to the Accession of Québec to Sovereignty, *The Attributes of a Sovereign Québec*, vol. I. Assemblée nationale, Québec.

Grand Council of the Crees (Québec), 1995: *Sovereign Injustice: Forcible Inclusion of the James Bay Crees, and Cree Territory into a Sovereign Québec*. Nemaska.

Gros Espiell, Héctor, 1979: "Self-Determination and Jus Cogens", in Antonio Cassese (ed.), *UN Law/Fundamental Rights*, pp. 167-173. Sitjhoff & Noordhoff, Alphen dan aan den Rijn.

Hall, David, 1934: *The Impossible Country: A Journey through the Last Days of Yugoslavia*. David R. Godine Publisher, Boston.

Hannum, Hurst, 1988: "New Developments in Indigenous Rights". *Virginia Journal of International Law*, 28: 649.

—, 1990: *Autonomy, Sovereignty, and Self-Determination: the Accommodation of Conflicting Rights*. University of Pennsylvania Press, Philadelphia.

Henkin, Louis, Richard Crawford Pugh, Oscar Schachter and Hans Smit, 1980: *Basic Documents Supplements to International Law: Cases and Materials*. Third Edition, West Publishing Co., St. Paul, Minnesota.

Heraclides, Alexis, 1991: *The Self-Determination of Minorities in International Politics*. Frank Cass, London.

Hirayasu, Naomi, 1987: "The Process of Self-Determination and Micronesia's Future Political Status Under International Law". *University of Hawaii Law Review*, 9: 487.

International Court of Justice (I.C.J.), 1975: I.C.J. Reports.

Kimminich, Otto, 1993: "A 'Federal' Right of Self-Determination?" in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 83-100. Martinus Nijhoff, Dordrecht.

Knight, David B., and Maureen Davis, 1987: *Self-Determination: an Interdisciplinary Annotated Bibliography*. Garland Publishing, New York.

Lâm, Maivân Clech, 1994: "Feeling Foreign in Feminism". *Signs: Journal of Women in Culture and Society*, Summer: 865-893.

Morris, Glenn T., 1992: "International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples", in M. Annette Jaimes (ed.), *The State of Native America*. South End Press, Boston.

Murswiek, Dietrich, 1993: "The Issue of a Right of Secession - Reconsidered", in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 21-40. Martinus Nijhoff, Dordrecht.

Nanda, Ved P., 1980: "Self-Determination outside the Colonial Context: the Birth of Bangladesh in Retrospect", in Yonah Alexander et Robert Friedlander (eds.), *Self-Determination: National, Regional and Global Dimensions*, pp. 193-220. Westview Press, Boulder.

Ofuatey-Kodjoe, W., 1977: *The Principle of Self-Determination in International Law*. Nellen Publishing Company, New York.

Pomerance, Michla, 1982: *Self-Determination in Law and Practice: the New Doctrine in the United Nations*. Martinus Nijhoff, La Haye.

—, 1984: "Self-Determination Today: the Metamorphosis of an Ideal". *Israel Law Review*, 19, nos 3 et 4.

Renan, Ernest, 1990: "Qu'est-ce qu'une nation?" in Homi K. Bhabha (dir.) *Nation et Narration*. Routledge, New York.

Rigo Sureda, A., 1973: *The Evolution of the Right to Self-Determination*. A. W. Sijthoff, Leiden.

Rosas, Allan, 1993: "Internal Self-Determination", in Christian Tomuschat (ed.), *Modern Law of Self-Determination*. Martinus Nijhoff, Dordrecht.

Salmon, Jean, 1993: "Internal Aspects of the Right to Self-Determination: towards a Democratic Legitimacy Principle?" in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 253-282. Martinus Nijhoff, Dordrecht.

Sanders, Douglas, 1993: "Self-Determination and Indigenous Peoples", in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 55-82. Martinus Nijhoff, Dordrecht.

Savage, Peter, 1983: "Irian Jaya: Reluctant Colony", in Ahmed Ali et Ron Crocombe (eds.), *Politics in Melanesia*. University of the South Pacific, Suva.

Sharp, Nonis, 1977: *The Rule of the Sword*. Kibble Books, Victoria.

Sohn, Louis B., 1980: "The Concept of Autonomy in International Law and the Practice of the United Nations". *Israel Law Review*, 15: 2.

Stavenhagen, Rodolfo, 1990: *The Ethnic Question: Conflicts, Development and Human Rights*. United Nations University, Tokyo.

Suzuki, Eisuke, 1976: "Self-Determination and World Public Order: Community Response to Territorial Separation". *Virginia Journal of International Law*, 16: 779.

Thornberry, Patrick, 1993: "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism", in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 101-138. Martinus Nijhoff, Dordrecht.

Tomuschat, Christian, 1993: "Self-Determination in a Post-Colonial World", in Christian Tomuschat (ed.), *Modern Law of Self-Determination*, pp. 1-20. Martinus Nijhoff, Dordrecht.

Tomuschat, Christian (ed.) 1993: *Modern Law of Self-Determination*. Martinus Nijhoff, Dordrecht.

Twining, William (ed.) 1990: *Issues of Self-Determination*. Aberdeen University Press, Aberdeen.

Umozurike, Umozurike Oji, 1972: *Self-Determination under International Law*. The Shoe String Press, Hamden,

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Connecticut.

Williams, Robert A., 1990: *The American Indian in Western Legal Thought: the Discourses of Conquest*. Oxford University Press, New York.



Appendixes

Documents

*The Issues at Stake of the International Decade*



*The year 1995 marked the United Nations 50th anniversary.*

## Appendix A

United Nations

International Labour Organisation

### **Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989<sup>1</sup>**

**The General Conference of the International Labour Organisation,**

**Having been convened** at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

**Noting** the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

**Recalling** the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

**Considering** that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationists orientation of the earlier standards, and

**Recognizing** the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

**Noting** that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

**Calling attention** to the distinctive contributions of indigenous and

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1 International Labour Organisation, 27 June 1989. Entered in force: 5 September 1991.

tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

**Noting** that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

**Having decided** upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

**Having determined** that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

**Adopts** this twenty-seventh day of June of the year one thousand nine hundred and eighty-nine the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989:

## Part I. General Policy

### *Article 1*

#### 1. This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

*Article 2*

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

- (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
- (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
- (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

*Article 3*

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

*Article 4*

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

*Article 5*

In applying the provisions of this Convention:

- (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems

- which face them both as groups and as individuals;
- (b) the integrity of the values, practices and institutions of these peoples shall be respected;
- (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

*Article 6*

1. In applying the provisions of this Convention, governments shall:
  - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
  - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
  - (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.
2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

*Article 7*

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.
2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development at areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to

assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

*Article 8*

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

*Article 9*

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

*Article 10*

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

*Article 11*

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.



*Article 12*

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

**Part II. Land**

*Article 13*

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term "lands" in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

*Article 14*

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

*Article 15*

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through

which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

*Article 16*

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

*Article 17*

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

*Article 18*

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

*Article 19*

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these peoples already possess.

**Part III. Recruitment and Conditions of Employment**

*Article 20*

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:

- (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
- (b) equal remuneration for work of equal value;
- (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
- (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.

3. The measures taken shall include measures to ensure:

- (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;

- (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
  - (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
  - (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.
4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

#### Part IV. Vocational Training, Handicrafts and Rural Industries

##### *Article 21*

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

##### *Article 22*

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.
2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.
3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

##### *Article 23*

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development.

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Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

## Part V. Social Security and Health

### *Article 24*

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

### *Article 25*

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

## Part VI. Education and Means of Communication

### *Article 26*

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

### *Article 27*

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value systems and their

further social, economic and cultural aspirations.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

*Article 28*

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

*Article 29*

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

*Article 30*

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

*Article 31*

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most

direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbor in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

## Part VII. Contacts and Co-operation across Borders

### *Article 32*

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

## Part VIII. Administration

### *Article 33*

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfillment of the functions assigned to them.

2. These programmes shall include:

- (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
- (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

## Part IX. General Provisions

### *Article 34*

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

### *Article 35*

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.



Part X. Final Provisions

*Article 36*

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

*Article 37*

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

*Article 38*

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

*Article 39*

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

*Article 40*

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the

Organisation to the date upon which the Convention will come into force.

*Article 41*

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

*Article 42*

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

*Article 43*

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides -

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

*Article 44*

The English and French versions of the text of this Convention are equally authoritative.

## Appendix B

United Nations

Sub-Commission on Prevention of Discrimination  
and Protection of Minorities.

Report on Its Forty-Sixth Session E/CN.4/1995/2 and  
E/CN.4/ Sub.2/1994/56

### **Resolution 1994/45: Draft United Nations Declaration on the Rights of Indigenous Peoples**

**Affirming** that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

**Affirming** also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

**Affirming** further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

**Reaffirming** also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

**Concerned** that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

**Recognizing** the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

**Welcoming** the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

**Convinced** that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

**Recognizing** also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

**Emphasizing** the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

**Recognizing** in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

**Recognizing** also that indigenous peoples have the right freely to determine their relationship with States in a spirit of coexistence, mutual benefit and full respect,

**Considering** that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

**Acknowledging** that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

**Bearing** in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

**Encouraging** States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

**Emphasizing** that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

**Believing** that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

**Solemnly proclaims** the following United Nations Declaration on

the Rights of Indigenous Peoples:

Part I

*Article 1*

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

*Article 2*

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

*Article 3*

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

*Article 4*

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

*Article 5*

Every indigenous individual has the right to a nationality.

Part II

*Article 6*

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

*Article 7*

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

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- a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c. Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- d. Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- e. Any form of propaganda directed against them.

*Article 8*

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

*Article 9*

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

*Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

*Article 11*

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- a. Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
- b. Recruit indigenous children into the armed forces under any circumstances;
- c. Force indigenous individuals to abandon their lands,

territories or means of subsistence, or relocate them in special centres for military purposes;

- d. Force indigenous individuals to work for military purposes under any discriminatory conditions.

### Part III

#### *Article 12*

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

#### *Article 13*

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

#### *Article 14*

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

### Part IV

#### *Article 15*

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right



and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

*Article 16*

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

*Article 17*

Indigenous peoples have the right to establish their own media in their own language. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

*Article 18*

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

*Part V*

*Article 19*

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

*Article 20*

Indigenous peoples have the right to participate fully, if they so

choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

*Article 21*

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

*Article 22*

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

*Article 23*

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

*Article 24*

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

Part VI

*Article 25*

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

*Article 26*

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

*Article 27*

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

*Article 28*

Indigenous peoples have the right to the conservation, restoration, and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

*Article 29*

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

*Article 30*

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Part VII

*Article 31*

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

*Article 32*

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

*Article 33*

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

*Article 34*

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

*Article 35*

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political,

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economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

#### *Article 36*

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

### *Part VIII*

#### *Article 37*

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

#### *Article 38*

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

#### *Article 39*

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

#### *Article 40*

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

*Article 41*

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

Part IX

*Article 42*

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

*Article 43*

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

*Article 44*

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

*Article 45*

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

## Appendix C

United Nations

Commission on Human Rights

Resolution 1995/32

**Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with operative paragraph 5 of General Assembly resolution 49/214 of 23 December 1994**

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**The Commission on Human Rights,**

**Bearing in mind** General Assembly resolution 47/75 of 14 December 1992 and part II, paragraph 28 of the Vienna Declaration and Programme of Action (A/CONF.157/23) ,

**Recalling** its resolution 1994/29 of 4 March 1994, in which it urged the Sub-Commission on Prevention of Discrimination and Protection of Minorities to complete its consideration of the draft declaration on the rights of indigenous people and submit to the Commission at its fifty-first session the draft declaration together with any recommendations thereon,

**Welcoming** Sub-Commission resolution 1994/45 of 26 August 1994 in which the Sub-Commission decided to adopt the draft declaration as agreed upon by the members of the Working Group on Indigenous Populations and to submit it to the Commission at its fifty-first session,

**Recalling** General Assembly resolution 49/214 of 23 December 1994, in which the Assembly encouraged the Commission to consider the draft declaration with the participation of representatives of indigenous people, on the basis of and in accordance with appropriate procedures to be determined by the Commission,

**Emphasizing** the importance and special nature of the draft declaration as a standard-setting exercise specifically for indigenous people,

**Recognizing** that organizations of indigenous people have special knowledge and understanding of the current situation of the world's indigenous people and their human rights needs,

**Expressing** its appreciation to the Working Group on Indigenous



Populations for its contribution to the process of elaboration of the draft declaration,

1. **Decides** to establish, as a matter of priority and from within existing overall United Nations resources, an open-ended inter-sessional working group of the Commission on Human Rights with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled draft "United Nations declaration on the rights of indigenous peoples" for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People;

2. **Encourages** the Working Group to consider in this context all aspects of the draft declaration, including its scope of application;

3. **Requests** that the Working Group meet for 10 working days at the earliest possible date in 1995;

4. **Also requests** that the Working Group recommend to the Commission the time and duration of its meetings in subsequent years;

5. **Further requests** the Working Group to submit a progress report to the Commission on Human Rights for consideration at its fifty-second session;

6. **Invites** relevant United Nations organs, bodies, programmes and specialized agencies and non-governmental organizations in consultative status with the Economic and Social Council which are interested in contributing to the activities of the Working Group to participate in its work, in accordance with established practice;

7. **Decides** that participation of other relevant organizations of indigenous people, in addition to non-governmental organizations in consultative status with the Economic and Social Council, should be in accordance with the relevant provisions of Economic and Social Council resolution 1296 (XLIV) of 23 May 1968 and the procedures set out in the annex to the present resolution, and invites such organizations to submit applications as soon as possible;

8. **Requests** the Secretary-General to invite Governments, intergovernmental organizations, non-governmental organizations in consultative status with the Economic and Social Council and organizations of indigenous people authorized to participate to submit, for consideration by the Working Group, comments on the draft declaration submitted by the Sub-Commission;

9. **Recommends** that the Economic and Social Council take the appropriate steps to expedite the implementation of the present resolution;

10. **Decides** to consider the question again at its fifty-second session under an appropriate agenda item to be decided upon;
11. **Recommends** the following draft decision to the Economic and Social Council for adoption:

**The Economic and Social Council,**

**Recalling** Commission on Human Rights resolution 1995/32 of 3 March 1995,

**Reaffirming** its resolution 1296 (XLIV) of 23 May 1968, entitled 'Arrangements for consultation with non-governmental organizations', in particular its paragraphs 9, 19 and 33,

**Recalling** the mandate of the Council Committee on Non-Governmental Organizations, especially as contained in paragraph 40 (a) of resolution 1296 (XLIV),

1. **Endorses** Commission on Human Rights resolution 1995/32 of 3 March 1995;
2. **Authorizes** the establishment, as a matter of priority and from within existing overall United Nations resources, of an open-ended inter-sessional working group of the Commission on Human Rights with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled draft 'United Nations declaration on the rights of indigenous peoples', for consideration and adoption by the General Assembly within the International Decade of the World's Indigenous People and operating in accordance with the procedures established by the Commission on Human Rights in the annex to resolution 1995/32;
3. **Also authorizes** the open-ended Working Group to meet for 10 working days at the earliest possible date in 1995;
4. **Invites** applications from organizations of indigenous people not in consultative status with the Economic and Social Council which are interested in participating in the Working Group;
5. **Requests** the Coordinator of the International Decade, in accordance with the procedures established by the Commission on Human Rights in resolution 1995/32 and following consultations with the States concerned, in accordance with Article 71 of the Charter of the United Nations, to forward all applications and information received to the Council Committee on Non-Governmental Organizations;
6. **Requests** the Council Committee on Non-Governmental Organizations to meet as necessary to examine the applications and, having considered all relevant information, including any views received from the States concerned, to recommend to the

Economic and Social Council those organizations of indigenous people which should be authorized to participate in the Working Group, including at the first session in 1995;

7. **Decides**, on the basis of the recommendations of the Council Committee on Non-Governmental Organizations, to authorize the participation in the work of the Working Group of interested organizations of indigenous people, in accordance with rules 75 and 76 of the rules of procedure of the functional commissions of the Economic and Social Council;
8. **Requests** the Commission on Human Rights at its fifty-second session to review the progress of the Working Group and to transmit its comments to the Economic and Social Council at its substantive session for 1996;
9. **Requests** the Secretary-General to provide the necessary services and facilities for the implementation of the present resolution."

53rd meeting 3 March 1995 [adopted without a vote.]

#### *Annex*

#### **Participation of Organizations of Indigenous People in the Open-ended Inter-sessional Working Group**

1. The procedures contained in the present annex are adopted solely to authorize the participation of organizations of indigenous people not in consultative status with the Economic and Social Council.

2. These procedures are consistent with the procedures set forth in resolution 1296 (XLIV) of 23 May 1968 of the Economic and Social Council and do not constitute a precedent in any other situation. They shall apply only to the Working Group created by Council resolution ... and they shall remain in effect for the duration of the Working Group.

3. Organizations of indigenous people not in consultative status wishing to participate in the Working Group may apply to the Coordinator of the International Decade. Such applications must include the following information concerning the organization concerned:

- (a) The name, headquarters or seat, address and contact person for the organization;
- (b) The aims and purposes of the organization (these should be in conformity with the spirit, purposes, and principles of the Charter of the United Nations);
- (c) Information on the programmes and activities of the organization and the country or countries in which they are carried out or to which they apply;
- (d) A description of the membership of the organization,

indicating the total number of members.

4. Upon receipt of applications, the Coordinator of the International Decade should consult with any State concerned pursuant to Article 71 of the Charter of the United Nations and paragraph 9 of resolution 1296 (XLIV) of the Economic and Social Council. The Coordinator should promptly forward all applications and information received to the Council Committee on Non-Governmental Organizations for its decision.

5. Authorization to participate shall remain valid for the duration of the Working Group subject to the relevant provisions of part VIII of resolution 1296 (XLIV) of the Economic and Social Council.

6. The activities of organizations of indigenous people authorized to participate in the Working Group pursuant to these procedures shall be governed by rules 75 and 76 of the rules of procedure of the functional commissions of the Economic and Social Council.

7. Organizations of indigenous people authorized to participate in the Working Group will have the opportunity to address the Working Group, consistent with the relevant provisions of paragraphs 31 and 33 of Council resolution 1296 (XLIV), and are encouraged to organize themselves into constituencies for this purpose.

8. Organizations of indigenous people may make written presentations which, however, will not be issued as official documents.

9. States having indigenous populations should take effective measures to bring the invitation to participate and these procedures to the attention of organizations of indigenous people potentially interested in contributing to and participating in the Working Group.

## Appendix D

United Nations

General Assembly

Resolution 50/157.

### **Programme of activities for the International Decade of the World's Indigenous People**

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#### **The General Assembly,**

**Bearing in mind** that one of the purposes of the United Nations, as set forth in the Charter, is the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

**Recalling** its resolutions 48/163 of 21 December 1993 and 49/214 of 23 December 1994 on the International Decade of the World's Indigenous People, and Commission on Human Rights resolution 1991/28 of 3 March 1995,<sup>1</sup>

**Recalling** also that the goal of the Decade is to strengthen international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, education, and health, and that the theme of the Decade is "Indigenous people: partnership in action",

**Recognizing** the importance of consultation and cooperation with indigenous people in planning and implementing the programme of activities for the Decade, the need for adequate financial support from the international community, including support from within the United Nations and the specialized agencies, and the need for adequate coordination and communication channels,

**Recalling** its invitation to organizations of indigenous people and other non-governmental organizations concerned to consider the contributions they can make to the success of the Decade, with a view to presenting them to the Working Group on Indigenous

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1. Official Records of the Economic and Social Council, 1995, Supplement No. 3 and corrigenda (E/1995/23 and Corr. 1 and 2), chap. II, sect. A.

**Populations,**

**Taking note** of Economic and Social Council decision 1992/255 of 20 July 1992, in which the Council requested United Nations bodies and specialized agencies to ensure that all technical assistance financed or provided by them was compatible with international instruments and standards, and encouraged efforts to promote coordination in this field and greater participation of indigenous people in the planning and implementation of projects affecting them,

**Mindful** of the relevant recommendations of the World Conference on Human Rights, the United Nations Conference on Environment and Development, the International Conference on Population and Development, the Fourth World Conference on Women and the World Summit on Social Development, and of the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,<sup>2</sup>

**Recognizing** the value and diversity of the cultures and forms of social organization of indigenous people, and convinced that the development of indigenous people within their countries will contribute to the socio-economic, cultural and environmental advancement of all the countries of the world,

1. **Takes note** of the final report of the Secretary-General on a comprehensive programme of action for the International Decade of the World's Indigenous People and the annexes to that report;<sup>3</sup>
2. **Decides** to adopt the programme of activities for the Decade contained in the annex to the present resolution;
3. **Also decides** that the programme of activities for the Decade may be reviewed and updated throughout the Decade and that at the mid-point of the Decade the Economic and Social Council and the General Assembly should review the results of the activities to identify obstacles to achievement of the goals of the Decade and to recommend solutions for overcoming those obstacles;
4. **Affirms** as a major objective of the Decade the adoption by the General Assembly of a declaration on the rights of indigenous people;
5. **Welcomes** the establishment of an open-ended inter-sessional Working Group of the Commission on Human Rights with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Subcommission on Prevention of Discrimination and Protection

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2. Resolution 50/6.

3. A/50/511.

of Minorities, entitled "Draft United Nations declaration on the rights of indigenous peoples", for consideration and adoption by the General Assembly within the Decade;

**6. Also welcomes** the decisions of the Economic and Social Council to approve the participation of some organizations of indigenous people in the open-ended inter-sessional Working Group, and encourages the continuing cooperation of the Economic and Social Council, the Committee on Non-governmental Organizations and the Centre for Human Rights of the Secretariat in processing further applications as a matter of priority in accord with the relevant: resolutions of the Commission on Human Rights and the Economic and social Council;

**7. Recognizes** among the important objectives of the Decade the consideration of the possible establishment of a permanent forum for indigenous people within the United Nations, as recommended in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, held at Vienna from 14 to 25 June 1993,<sup>4</sup> and welcomes the report of the workshop on the possible establishment of a permanent forum for indigenous people held at Copenhagen from 26 to 28 June 1995<sup>5</sup> and the ongoing dialogue on this subject;

**8. Recommends** that the Secretary-General, drawing on the expertise of the Commission on Human Rights as well as the Commission for Sustainable Development and other relevant bodies, undertake a review, in close consultation with Governments and taking into account the views of indigenous people, of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people, and report to the General Assembly at its fifty-first session;

**9. Also recommends** that the Commission on Human Rights, drawing on the results of the review and the Copenhagen workshop, consider the convening of a second workshop on the possible establishment of a permanent forum for indigenous people with the participation of independent experts as well as representatives of Governments, organizations of indigenous people and other non-governmental organizations concerned and United Nations bodies and specialized agencies;

**10. Recognizes** the importance of strengthening the human and institutional capacity of indigenous people to develop their own solutions to their problems and, for these purposes, recommends

4. A/CONF 157/24 (Part I), chap. III.

5. E/CN. 4/Sub .2/AC.4/1995/7 and Add. 1-3.



that the United Nations University consider the possibility of sponsoring, in each region, one or more institutions of higher education as centres of excellence and the diffusion of expertise, and invites the Commission on Human Rights to recommend appropriate means of implementation;

11. **Recommends** that special attention be given to improving the extent and effectiveness of the participation of indigenous people in planning and implementing the activities for the Decade, including through the recruitment, where appropriate, by relevant United Nations bodies and specialized agencies of staff from among indigenous nationals of Member States, consistent with Article 101 of the Charter of the United Nations and within existing resources and staff levels;

12. **Recommends** that the Secretary-General:

- (a) Request United Nations representatives in countries where there are indigenous people to promote, through the appropriate channels, greater participation of indigenous people in the planning and implementation of projects affecting them;
- (b) Ensure coordinated follow-up to the recommendations concerning indigenous people of relevant world conferences, namely the World Conference on Human Rights, the United Nations Conference on Environment and Development, the International Conference on Population and Development, the Fourth World Conference on Women and the World Summit for Social Development;
- (c) Urge relevant United Nations conferences to promote and facilitate to the extent possible and as appropriate the effective input of the views of indigenous people;
- (d) Ensure that information about the programme of activities for the Decade, and opportunities for indigenous people to participate in those activities, is disseminated in all countries and to the greatest possible extent in indigenous languages, to be financed from within existing budgetary resources;
- (e) Report on progress made at the national, regional and international levels in accomplishing these objectives to the General Assembly at its fifty-first session;

13. **Requests** the United Nations High Commissioner for Human Rights to promote the objectives of the Decade, taking into account the special concerns of indigenous people, in the fulfilment of his functions;

14. **Requests** the Assistant Secretary-General for Human Rights, in his capacity as Coordinator of the Decade, bearing in mind the contribution that indigenous people have the capacity to make, to

establish, within existing resources, a unit within the Centre for Human Rights, including indigenous persons, to support its activities related to indigenous people, in particular to plan, coordinate and implement activities for the Decade;

15. **Invites** the Assistant Secretary-General for Human Rights to consider the appointment of a fund-raiser who could develop new sources of funding for the Decade;

16. **Requests** the Administrative Committee on Coordination, through its inter-agency process, to consult and coordinate on the Decade, with a view to assisting the Coordinator of the Decade to fulfil his function, and to report on activities of the United Nations system in relation to the Decade to the General Assembly in each year of the Decade;

17. **Invites** the United Nations financial and development institutions, operational programmes and specialized agencies, in accordance with the existing procedures of their governing bodies:

(a) To give increased priority and resources to improving the conditions of indigenous people, with particular emphasis on the needs of those people in developing countries, including by the preparation of specific programmes of action for the implementation of the goals of the Decade, within their areas of competence;

(b) To launch special projects through appropriate channels and in collaboration with indigenous people, for strengthening their community-level initiatives, and to facilitate the exchange of information and expertise among indigenous people and other relevant experts;

(c) To designate focal points for coordination with the Centre for Human Rights of activities related to the Decade;

18. **Emphasizes** the important role of international cooperation in promoting the goals and activities of the Decade and the rights, well-being and sustainable development of indigenous people;

19. **Also emphasizes** the importance of action at the national level to the implementation of the goals and activities of the Decade;

20. **Encourages** Governments to support the Decade by:

(a) Contributing to the United Nations Trust Fund for the Decade;

(b) Preparing relevant programmes, plans and reports in relation to the Decade, in consultation with indigenous people;

(c) Seeking means in consultation with indigenous people, of giving indigenous people greater responsibility for their own affairs and an effective voice in decisions on matters which affect them;

(d) Establishing national committees or other mechanisms involving indigenous people to ensure that the objectives and activities of the Decade are planned and implemented on the basis of full partnership with indigenous people;

21. **Also encourages** Governments to consider contributing, as appropriate, to the Fund for the Development of Indigenous Peoples of Latin America and the Caribbean, in support of the achievement of the goals of the Decade;

22. **Appeals** to Governments and intergovernmental and non-governmental organizations to support the Decade by identifying resources for activities designed to implement the goals of the Decade, in cooperation with indigenous people;

23. **Decides** to include in the provisional agenda of its fifty-first session the item entitled "Programme of activities of the International Decade of the World's Indigenous People".

#### *Annex*

#### **Programme of activities for the International Decade of the World's Indigenous People**

##### **A. Objectives**

1. Taking into account General Assembly resolution 48/163 of 21 December 1993, the main objective of the International Decade of the World's Indigenous People is the strengthening of international cooperation for the solution of problems faced by indigenous people in such areas as human rights, the environment, development, health, culture and education.

2. The specialized agencies of the United Nations system and other international and national agencies, as well as communities and private enterprises, should devote special attention to development activities of benefit to indigenous communities.

3. A major objective of the Decade is education of indigenous and non-indigenous societies concerning the situation, cultures, languages, rights and aspirations of indigenous people. In particular, efforts should be made to cooperate with the United Nations Decade for Human Rights Education.

4. An objective of the Decade is the promotion and protection of the rights of indigenous people, and their empowerment to make choices that enable them to retain their cultural identity while participating in political, economic and social life, with full respect for their cultural values, languages, traditions and forms of social organization.

5. An objective of the Decade is to further the implementation of the recommendations pertaining to indigenous people of all high-level

international conferences, including the United Nations Conference on Environment and Development, the World Conference on Human Rights, in particular its recommendation that consideration be given to the establishment of a permanent forum for indigenous people in the United Nations system, the United Nations Conference on Population, and Development and the World Summit for Social Development as well as all future high-level meetings.

6. An objective of the Decade is the adoption of the draft "United Nations declaration on the rights of indigenous peoples" and the further development of international standards as well as national legislation for the protection and promotion of the human rights of indigenous people, including effective means of monitoring and guaranteeing those rights.

7. The objectives of the Decade should be assessed by quantifiable outcomes that will improve the lives of indigenous people and that can be evaluated halfway through the Decade and at its end.

**B. Activities to be undertaken by the major actors**

*1. United Nations observances*

8. A formal observance each year on the International Day of the World's Indigenous People, in New York, Geneva and other offices of the United Nations.

9. Official observance of the Decade as part of the Fourth World Conference on Women, the United Nations Conference on Human Settlements (Habitat II) and other international conferences related to the aims and themes of the Decade.

10. Issuance of a special series of stamps by the United Nations Postal Administration highlighting the goals and themes of the Decade.

*2. Activities of the Coordinator and the Centre for Human Rights*

11. Establish, as a matter of urgency, an adequately staffed and resourced indigenous people's unit.

12. Request Governments to second qualified indigenous people, in consultation with interested national indigenous organizations, to assist in the administration of the Decade.

13. Create a fellowship programme, in collaboration with the Advisory Services of the Centre for Human Rights of the Secretariat and Governments, to assist indigenous people wishing to gain experience in the different branches of the Centre, and in other parts of the United Nations system. Such fellowships might be available for indigenous research and other similar activities

14. Open a roster of indigenous experts in various fields who might

be available to assist United Nations agencies, in collaboration with Governments as appropriate, as partners or consultants.

15. Create an advisory group of persons with relevant knowledge of indigenous issues, acting in their personal capacity, to advise the Coordinator for the Decade and United Nations organizations, at their request. The members of this advisory group could include eminent indigenous persons, governmental representatives, independent experts and officials of the specialized agencies.

16. Consider the need to hold coordination meetings of Governments, organizations of the United Nations system and indigenous and non-governmental organizations, as necessary, to consider, examine and evaluate Decade activities and to develop an integrated, action-oriented strategy to advance the interests of indigenous people. The Economic and Social Council should hold mid-term and end-term reviews of the Decade in accordance with its resolution 1988/63 of 27 July 1988. The Working Group on Indigenous Populations should review international activities undertaken during the Decade and receive information from Governments on the implementation of the goals of the Decade in their respective countries.

17. Compile, on the basis of communications of the focal points in the United Nations system, a regular news-sheet containing information about meetings of interest, major or innovative projects, new sources of funding, policy developments and other news to be widely distributed.

18. Encourage the development of partnership projects in association with Governments to address specific regional or thematic issues bringing together Governments, indigenous people and appropriate United Nations agencies.

19. Establish an information programme linking the Coordinator to focal points of the United Nations system, national committees for the Decade and through appropriate channels, indigenous networks; also develop a database of indigenous organizations and other relevant information, in cooperation with indigenous people, Governments, academic institutions and other relevant bodies.

20. Organize meetings on relevant themes of concern to indigenous people with indigenous participation.

21. Launch a series of publications on indigenous issues to inform policy makers, opinion-formers, students and other interested people.

22. Develop, in collaboration with Governments, training programmes on human rights for indigenous people, including the preparation of relevant training materials, when possible in

indigenous languages.

23. Establish a board of trustees or advisory group, including indigenous people, to assist the Coordinator of the Voluntary Fund for the International Decade.

24. Encourage the development of projects and programmes, in collaboration with Governments, and taking into account the views of indigenous people and the appropriate United Nations agencies, for support by the Voluntary Fund for the Decade.

25. Ensure, in coordination with Governments and indigenous organizations, the necessary measures to guarantee financing of the objectives of the Decade.

*3. United Nations public information activities*

26. Produce and disseminate a series of posters on the Decade using designs by indigenous artists.

27. Organize a lecture series at United Nations information centres and campuses linked to the United Nations University, using indigenous speakers.

28. Publish in indigenous languages the Universal Declaration of Human Rights, international human rights conventions and, upon its adoption, the United Nations declaration on the rights of indigenous people. Consider the use of audiovisual material for this purpose. Consider also the involvement of indigenous experts and their own information networks to disseminate information about the Decade.

29. Prepare, in collaboration with the Centre for Human Rights, information about indigenous people for distribution to the general public.

*4. Operational activities of the United Nations system*

30. Establish focal points for indigenous issues in all appropriate organizations of the United Nations system.

31. Adopt programmes of action for the Decade in the governing bodies of specialized agencies of the United Nations system in their own fields of competence, in close cooperation with indigenous people.

32. Urge Governments to ensure that the programmes and budgets of relevant intergovernmental organizations give priority and devote sufficient resources for furthering the aims of the Decade, and request that regular reports on the action taken be submitted to the governing body or executive council of each organization.

33. Prepare, publish and disseminate a manual containing practical information for indigenous people on the operations and procedures

of United Nations agencies.

34. Develop research on the socio-economic conditions of indigenous people, in collaboration with indigenous organizations and other appropriate partners, with a view to publishing regular reports in order to contribute to the solution of problems faced by indigenous people, taking into account paragraph 6.26 of the Programme of Action of the International Conference on Population and Development, held at Cairo from 5 to 13 september 1994.<sup>6</sup>

35. Encourage Governments to establish appropriate mechanisms and practices to ensure the participation of indigenous people in the design and implementation of national and regional programmes of concern to them.

36. Hold regular inter-agency consultations, in collaboration with Governments and indigenous people, to exchange views and develop strategies on the programme of action for the Decade.

37. Hold consultations with Governments to examine, with national committees and development agencies, possibilities of cooperation in the activities of the Decade.

38. Develop training materials for indigenous people on human rights, including the translation of the main international instruments into different indigenous languages, and give them wide distribution. Consider the possibility of using radio programmes in order to gain access to indigenous communities not having written languages.

39. Prepare a database on national legislation on matters of particular relevance to indigenous people.

40. Hold consultations on all interested parties on the themes of human rights, development, the environment, health and education, and culture, with a view to elaborating programmes in these areas.

*5. Activities of regional organizations*

41. Implement existing and develop new regional programmes of action to promote and support the objectives of the Decade.

42. Hold regional meetings on indigenous issues with existing regional organizations with a view to strengthening coordination, taking advantage of the machinery of the United Nations system and promoting the direct and active participation of indigenous people of the different regions in collaboration with Governments. The Working Group on Indigenous Populations could consider the possibility of holding its sessions in conjunction with these

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6. A/CONF.171/13, chap. I, resolution 1, annex.



meetings.

43. Develop training courses and technical assistance programmes for indigenous people in areas such as project design and management, environment, health and education, and promote the exchange of skills and experiences of indigenous people from different regions.

44. Make funds available at the regional level to activities benefiting indigenous people.

45. Encourage regional organizations to draw up regional instruments for the promotion and protection of indigenous people in the framework of their own structures, and promote existing regional instruments.

*6. Activities of Member states*

46. Establish national committees for the Decade or similar mechanisms, to include indigenous people, all relevant departments and other interested parties duly convened by Governments, to mobilize public support for the various activities connected with the Decade.

47. Intensify coordination and communication at the national level between relevant ministries, agencies and regional and local authorities by establishing focal points or other mechanisms for coordination and dissemination of information.

48. Use part of the resources of existing programmes and of international assistance for activities of direct benefit to indigenous people and, where possible, provide additional funds for specific activities.

49. Develop, in collaboration with indigenous communities, national plans for the Decade, including main objectives and targets, fixing quantitative outcomes and taking into account the need for resources and possible sources of financing.

50. Provide appropriate resources for indigenous institutions, organizations and communities to develop their own plans and actions according to their own priorities.

51. Adopt measures, in cooperation with indigenous people, to increase knowledge, starting at the elementary-school level and in accord with the age and development of schoolchildren, concerning the history, traditions, culture and rights of indigenous people, with special emphasis on the education of teachers at all levels, and adopt measures to restore indigenous place names.

52. Consider ratification and implementation of the International Labour Organization Convention (No.169) on Indigenous and Tribal Peoples and other international and regional instruments in close

consultation with the indigenous organizations of each country.

53. Recognise the existence, identity and rights of indigenous people through constitutional reforms or the adoption of new laws, when appropriate, to improve their legal status and guarantee their economic, social, cultural, political and civil rights.

54. Implement chapter 26 of Agenda 21<sup>7</sup>, adopted by the United Nations Conference on Environment and Development, and the relevant provisions of the Convention on Biological Diversity<sup>8</sup>, the Vienna Declaration and Programme of Action, the Programme of Action of the International Conference on Population and Development, the Programme of Action of the World Summit for Social Development<sup>9</sup> as well as the relevant provisions of future high-level conferences.

*7. Activities of organizations of indigenous people*

55. Establish an information network which can be linked to the Coordinator and facilitate communications between the United Nations system, relevant governmental departments and indigenous communities.

56. Indigenous organizations and international indigenous networks should develop information for local communities concerning the goals of the Decade and the activities of the United Nations.

57. Establish and support indigenous schools and university-level institutions and collaborate with the relevant United Nations agencies; participate in the revision of school texts and the contents of programmes of study in order to eliminate discriminatory content and promote the development of indigenous cultures and, where appropriate, in indigenous languages and scripts; develop indigenous curricula for schools and research institutions.

58. Create documentation centres, archives and in situ museums concerning indigenous people, their cultures, laws, beliefs and values, with material that could be used to inform and educate non-indigenous people on these matters. Indigenous people should

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7. Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution I, annex II.

8. See United Nations Environment Programme, Convention on Biological Diversity (Environmental Law and Institutions Programme Activity Centre), June 1992.

9. A/CONF.166/9, chap. I, resolution I, annex II.

participate on a preferential basis in the administration of these centres.

59. Establish and promote networks of indigenous journalists and launch indigenous periodicals at the regional and international levels.

60. Indigenous people may transmit to Governments, the United Nations and the specialized agencies and regional organizations their views on the programmes concerning their priority rights.

*8. Activities of non-governmental organization and other interested parties, including education establishments, the media and business*

61. Cooperate with indigenous organizations, communities and people in the planning of activities for the Decade.

62. Non-governmental organizations working with indigenous people should involve indigenous people in the activities.

63. Create radio and television centres in indigenous regions when appropriate and in accordance with national legislation to provide information on the problems and proposals of indigenous people and to improve communications between indigenous communities.

64. Promote indigenous cultures with due respect for intellectual property rights through the publication of books, the production of compact discs, and the organization of various artistic and cultural events which enhance knowledge of and serve to develop indigenous cultures and establish indigenous cultural and documentation centres.

65. Involve different social and cultural groups in the activities planned for the Decade.

21 December 1995

## Appendix E

### Organization of American States

#### Inter-American Commission on Human Rights

#### **Draft of the Inter-American Declaration on the Rights of Indigenous Peoples (AG/RES 1022 XIX-0/89)**

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##### Preamble

1. Indigenous institutions and the strengthening of nations.

**The Member States of the Organization of American States** (hereafter the States),

**Recalling** that the indigenous peoples of the Americas constitute an organized, distinctive and integral segment of their population and are entitled to be part of the countries' national identity, and have a special role to play in strengthening the institutions of the State and in establishing national unity based on democratic principles; and,

**Further recalling** that some of the democratic institutions and concepts embodied in the Constitutions of American States originate from institutions of the indigenous peoples, and that in many instances their present participatory systems for decision-making and the internal authority of the indigenous peoples contribute to improving democracies in the Americas.

2. Eradication of poverty.

**Recognizing** the severe and widespread poverty afflicting indigenous peoples in many regions of the Americas, and that their living conditions and social services are generally deplorable; and concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting inter alia in their colonization and the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

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Draft approved by the Inter-American Commission on Human Rights at the 1278 session held on September 18, 1995.

Document OEA/Ser/L/V/II.90 Doc. 9 rev. 1 September 21, 1995.

Recalling that in the Declaration of Principles issued by the Summit of the Americas, in December 1994, the Heads of State and Governments declared that in observance of the International Decade of the World's Indigenous People, they will focus their energies on improving the exercise of democratic rights and the access to social services by indigenous peoples and their communities.

3. Indigenous culture and ecology.

**Appreciating** the respect for the environment accorded by the cultures of indigenous peoples of the Americas and considering the special relationship between the indigenous peoples and the land on which they live.

4. Harmonious relations, respect and the absence of discrimination.

**Mindful** of the responsibility of all the States and peoples of the Americas to participate in the struggle against racism and racial discrimination.

5. Enjoyment of community rights.

**Recalling** the international recognition of rights that can only be enjoyed when exercised in community with other members of a group.

6. Indigenous survival and control of their territories.

**Considering** that in many indigenous cultures, traditional collective systems for control and use of land and territory, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being; and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the States in which they live.

7. Demilitarization of indigenous areas.

**Noting** the presence of armed forces in many areas of the lands and territories of the indigenous peoples, and emphasizing the importance of withdrawing them from where they are not strictly needed for their specific functions.

8. Human rights instruments and other advances in international law.

**Recognizing** the preeminence and applicability of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and international human rights law, to the States and Peoples of the Americas; and

**Mindful** of the progress achieved by the States and indigenous

## *The Issues at Stake of the International Decade*

organizations in codifying indigenous rights, especially in the sphere of the United Nations and the International Labor Organization, and in this regard recalling the ILO Agreement 169 and the Draft UN Declaration on the subject.

**Affirming** the principle of the universality and indivisibility of human rights, and the application of international human rights to all individuals.

9. Advances in the provisions of national instruments.

**Noting** the constitutional and legislative progresses achieved in some countries of the Americas in guaranteeing the rights and institutions of indigenous peoples.

**Declare:**

### Section one. Indigenous peoples

#### *Article I. Definition*

1. In this Declaration indigenous peoples are those who embody historical continuity with societies which existed prior to the conquest and settlement of their territories by Europeans, [alternative 1: as well as peoples brought involuntarily to the New World who freed themselves and re-established the cultures from which they have been torn.], [alternative 2: as well as tribal peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.]

2. Self identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Declaration apply.

3. The use of the term "peoples" in this instrument shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law.

### Section two. Human rights

#### *Article II. Full observance of human rights*

1. Indigenous peoples have the rights to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and international human rights law; and nothing in this Declaration shall be construed as in any way limiting or denying those rights or authorizing any action not in accordance with the instruments of international law including human rights law.

2. The States shall ensure for all indigenous peoples the full exercise of their rights.

3. The States also recognize that the indigenous peoples are entitled to collective rights insofar as they are indispensable to the enjoyment of the individual human rights of their members. Accordingly they recognize the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs and to use their languages.

*Article III. Right to belong to an indigenous community or nation*

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

*Article IV. Legal status of communities*

The States shall ensure that within their legal system personality is attributed to communities of indigenous peoples.

*Article V. No forced assimilation*

The States shall not take any action which forces indigenous peoples to assimilate and shall not endorse any theory, or engage in any practice, that imports discrimination, destruction of a culture or the possibility of the extermination of any ethnic group.

*Article VI. Special guarantees against discrimination*

1. The States recognize that, where circumstances so warrant, special guarantees against discrimination may have to be instituted to enable indigenous peoples to fully enjoy internationally and nationally-recognized human rights; and that indigenous peoples must participate fully in the prescription of such guarantees.

2. The States shall also take the measures necessary to enable both indigenous women and men to exercise, without any discrimination, civil, political, economic, social and cultural rights. The States recognize that violence exerted against persons because of their gender prevents and nullifies the exercise of those rights.

**Section three. Cultural development**

*Article VII. Right to cultural integrity*

1. States shall respect the cultural integrity of indigenous peoples, their development in their respective habitats and their historical and archaeological heritage, which are important to the identity of the members of their groups and their ethnic survival.



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2. Indigenous peoples are entitled to restitution in respect of property of which they have been dispossessed, or compensation in accordance with international law.

3. States shall recognize, and respect, indigenous lifestyles, customs, traditions, forms of social organization, use of dress, languages and dialects.

### *Article VIII. Philosophy, outlook and language*

1. States recognize that indigenous languages, philosophy and outlook are a component of national and universal culture, and as such shall respect them and facilitate their dissemination.

2. The States shall take measures to see to it that broadcast radio and television programs are broadcast in the indigenous languages in the regions where there is a strong indigenous presence, and to support the creation of indigenous radio stations and other media.

3. The States shall take effective measures to enable indigenous peoples to understand administrative, legal and political rules and procedures and to be understood in relations to these matters. In areas where indigenous languages are predominant, States shall endeavor to establish the pertinent languages as official languages and to give them the same status that is given to non-indigenous official languages.

4. When indigenous peoples wish, educational systems shall be conducted in the indigenous languages and incorporate indigenous content, and that shall also provide the necessary training and means for complete mastery of the official language or languages.

### *Article IX. Education*

1. Indigenous peoples shall be entitled to

- a) establish and set in motion their own educational programs, institutions and facilities,
- b) to prepare and implement their own educational plans, programs, curricula and materials;
- c) to train, educate and accredit their teachers and administrators.

The States shall endeavor to ensure that such systems guarantees equal educational and teaching opportunities for the entire population and complementarity with national educational systems.

2. States shall ensure that those educational systems are equal in all ways to that provided to the rest of the population.

3. States shall provide financial and any other type of assistance needed for the implementation of the provisions of this article.

*Article X. Spiritual and religious freedom*

1. Indigenous peoples have the right to liberty of conscience, freedom of religion and spiritual practice for indigenous communities and their members, a right that implies freedom to conserve them, change them, profess and propagate them, both publicly and privately.
2. States shall take necessary measures to ensure that attempts are not made to forcibly convert indigenous peoples or to impose on them beliefs against the will of their communities.
3. In collaboration with the indigenous peoples concerned, the States shall adopt effective measures to ensure that their sacred sites, including burial sites, are preserved, respected and protected. When sacred graves and relics have been appropriated by state institutions, they shall be returned.

*Article XI. Family relations and family ties*

1. Families are a natural and basic component of societies and must be respected and protected by the State. Consequently the State shall protect and respect the various established forms of indigenous organizations relating to family and filiation.
2. In determining the child's best interest in matters relating to the protection and adoption of children of members of indigenous peoples, and in matters of breaking of ties and other similar circumstances, consideration shall be given by Courts and other relevant institutions to the views of those peoples, including individual, family and community views.

*Article XII. Health and well-being*

1. The States shall respect indigenous medicine, pharmacology, health practices and promotion, including preventive and rehabilitative practices.
2. They shall facilitate the dissemination of those medicines and practices of benefit to the entire population.
3. Indigenous peoples have the right to the protection of vital medicinal plants, animal and minerals.
4. Indigenous peoples shall be entitled to use, maintain, develop and manage their own health services, and they shall also have access, without any discrimination, to all health institutions and services and medical care.
5. The States shall provide the necessary means to enable the indigenous peoples to eliminate such health conditions in their communities which fall below international accepted standards.

*Article XIII. Right to environmental protection*

1. Indigenous peoples are entitled to a healthy environment, which is an essential condition for the enjoyment of the right to life and well-being.
2. Indigenous peoples are entitled to information on the environment, including information that might ensure their effective participation in actions and policies that might affect their environment.
3. Indigenous peoples shall have the right to conserve, restore, and protect their environment, and the productive capacity of their lands, territories and resources.
4. Indigenous peoples shall participate fully in formulating and applying governmental programmes of conservation of their lands and resources.
5. Indigenous peoples shall be entitled to assistance from their states for purposes of environmental protection, and may request assistance from international organizations.

*Section four. Organizational and political rights*

*Article XIV. Rights of association, assembly, freedom of expression and freedom of thought*

1. The States shall promote the necessary measures to guarantee to indigenous communities and their members their right of association, assembly and expression in accordance with their usages, customs, ancestral traditions, beliefs and religions.
2. The States shall respect and enforce the right of assembly of indigenous peoples and to the use of their sacred and ceremonial areas, as well as the right to full contact and common activities with sectors and members of their ethnic groups living in the territory of neighboring states.

*Article XV. Right to self government, management and control of internal affairs*

1. States acknowledge that indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development, and that accordingly they have the right to autonomy or self-government with regard to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by nonmembers; and to the ways and means for financing these autonomous functions.

2. Indigenous populations have the right to participate without discrimination, if they so decide, in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny. They may do so through representatives elected by them in accordance with their own procedures. They shall also have the right to maintain and develop their own indigenous decision-making institutions, as well as equal opportunities to access to all national fora.

*Article XVI. Indigenous law*

1. Indigenous law is an integral part of the States' legal system and of the framework in which their social and economic development takes place.

2. Indigenous peoples are entitled to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems pertaining to ownership of real property and natural resources, resolution of conflicts within and between indigenous communities, crime prevention and law enforcement and maintenance of internal peace and harmony.

3. In the jurisdiction of any State, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of the native language.

*Article XVII. National incorporation of indigenous legal and organizational systems*

1. The States shall promote the inclusion, in their national organizational structures, of institutions and traditional practices of indigenous peoples.

2. The institutions of each state in areas that are predominantly indigenous or that are serving in those communities, shall be designed and adapted as to reflect and reinforce the identity, culture and organization of those populations, in order to facilitate their participation.

*Section five. Social, economic and property rights*

*Article XVIII. Traditional forms of ownership and ethnic survival rights to land and territories*

1. Indigenous peoples have the right to the legal recognition of the various and specific forms of control, ownership and enjoyment of territories and property by indigenous peoples.

2. Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands and territories they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.

3. Where property and user rights of indigenous peoples arise from rights existing prior to the creation of those States, the States shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible. This shall not limit the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them. Such titles may only be changed by mutual consent between the State and respective indigenous people when they have full knowledge and appreciation of the nature or attributes of such property.

4. The rights of indigenous peoples to existing natural resources on their lands must be especially protected. These rights include the right to the use, management and conservation of such resources.

5. In the event that ownership of the minerals or resources of the subsoil pertains to the State or that the State has rights over other resources on the lands, the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these peoples would be adversely affected and to what extent, before undertaking or authorizing any program for tapping or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation in accordance with international law, for any damages which they may sustain as a result of such activities.

6. The States shall not transfer or relocate indigenous peoples except in exceptional cases, and in those cases with the free, genuine and informed consent of those populations, with full and prior indemnity and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist.

7. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or the right to compensation in accordance with international law when restitution is not possible.

8. The States shall take all measures, including the use of law enforcement personnel, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons or by

persons who take advantage of indigenous peoples or their lack of understanding of the laws, to take possession or make use of them. The States shall give maximum priority to the demarcation of properties and areas of indigenous use.

*Article XIX. Workers rights*

1. Indigenous peoples shall have the right to full enjoyment of the rights and guarantees recognized under international labor law or domestic labor law; they shall also be entitled, where circumstances so warrant, to special measures to correct, redress and prevent the discrimination to which they have historically been subject.

2. Where circumstances so warrant, the State shall take such special measures as may be necessary to:

a. protect effectively the workers and employees who are members of indigenous communities in respect of fair and equal hiring and terms of employment, insofar as general legislation governing workers overall does not provide;

b. to improve the work inspection service in regions, companies or paid activities involving indigenous workers or employees;

c. ensure that indigenous workers:

i. enjoy equal opportunity and treatment as regards all conditions of employment, job promotion and advancement;

ii. are not subjected to racial, sexual or other forms of harassment;

iii. are not subjected to coercive hiring practices, including servitude for debts or any other form of servitude, even if they have their origin in law, custom or a personal or collective arrangement which shall be deemed absolutely null and void in each instance;

iv. are not subjected to working conditions that endanger their health, particularly as a result of their exposure to pesticides or other toxic or radioactive substances;

v. receive special protection when they serve as seasonal, casual or migrant workers in agriculture or in other activities and also when they are hired by labor contractors in order that they benefit from national legislation and practice which must, itself be in accordance with firmly established international human rights standards in respect of seasonal workers, and

vi. ensure that indigenous workers or employees are provided with full informations on their rights, consistent with such traditional legislations and international standards, and on recourse available to them in order to protect those rights.

*Article XX. Intellectual property rights*

1. Indigenous peoples shall be entitled to recognition of the full ownership, control and protection of such intellectual property rights as they have in their cultural and artistic heritage, as well as special measures to ensure for them legal status and institutional capacity to develop, use, share, market and bequeath, that heritage on the future generations.

2. Where circumstances so warrant, indigenous peoples have the right to special measures to control, develop and protect, and full compensation for the use of their sciences and technologies, including their human and genetic resources in general, seeds, medicine, knowledge of plant and animal life, original designs and procedures.

*Article XXI. Right to development*

1. The States recognize the right of indigenous peoples to decide democratically what values, objectives, priorities and strategies will govern and steer their development course, even if they are different from those adopted by the national government or by other segments of society. Indigenous peoples shall be entitled to obtain on a non-discriminatory basis appropriate means for their own development according to their preferences and values, and to contribute by their own means, as distinguishable societies, to national development and international cooperation.

2. The States shall take necessary measures to ensure that decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous people are not made without the free and informed consent and participation of those peoples, that their preferences are recognized and that no such plan, program or proposal that could have harmful effects on the normal livelihood of those populations is adopted. Indigenous communities have the right to restitution or compensation in accordance with international law, for any damage which, despite the foregoing precautions, the execution of those plans or proposal may have caused them; and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

*Section sixth. General provisions*

*Article XXII. Treaties, agreements and other Implied arrangements*

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other arrangements concluded with States or their successors, according to their spirit and intent, and to have States honor and respect such treaties, agreements and other constructive arrangements. Conflicts and



disputes which cannot otherwise be settled should be submitted to competent international bodies (agreed to by all parties concerned).

*Article XXIII*

Nothing in this instrument shall be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

*Article XXIV*

Nothing in this instrument shall be construed as granting any rights to ignore boundaries between States.

September 18, 1995.

Printed in March 1996 by  
 **VEILLEUX**  
ON DEMAND PRINTING INC.  
in Boucherville, Quebec

**The International Centre for Human Rights and Democratic Development**

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